REVIEW OF LEGAL FRAMEWORK GOVERNING MEDIA

MODERNIZING MEDIA LAW IN PAKISTAN

TOBY MENDEL
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EXECUTIVE SUMMARY

Freedom of expression is a cornerstone of democracy and liberty. Democracy depends on and can only flourish where free speech rights are respected. On the other hand, it contracts and decays where speech is unduly restricted to serve interests of a particular class, ideology or institution. In various forms and to varying degrees, in Pakistan freedom of expression remains shackled across all mediums, all frontiers, and all areas of thought and conduct. The anachronistic laws that were put in place during the restrictive colonial period were inherited by the ruling elites of Pakistan in 1947, and have been preserved and expanded with zeal since then. On the other hand, any such laws which were still in force in the United Kingdom at that time have long since been repealed and/or reformed there.

Freedom of expression not only is essential as an underpinning of political participation but it also represents a basic human good, i.e. knowledge and the search for the 'truth'. It is essential for societal tolerance, cultural exchange and self-restraint. It promotes autonomy for individuals and communities. Law should support the right to free speech not just for its own sake, albeit subject to well-defined, proportionate restricts as are necessary, but also as a means for achieving self-realisation. It should provide a balancing between competing rights and interests in a society which is made up of divergent groups. Freedom of expression is thus essential for inclusiveness and cohesion in society.

These philosophical truths have motivated this research and review, which provides a comprehensive technical and critical analysis of the legal framework governing expression and the media in Pakistan. The study not only critically assesses statute law but also the case law developed by the courts of Pakistan while interpreting the laws. Someone once said that 'we all are under a constitution', but this is ultimately what judges say it is. Courts are vested with the principal task of interpreting the law, especially when there is a dispute about it in society. Most of the existing commentaries and reports in Pakistan

about the state of media law have failed to allocate sufficient attention to how courts have interpreted various provisions relating to expression and the media. An important body of research looks at this issue from a journalist's, or a sociologist's point of view, while far less research is available which looks at it from a legal and jurisprudential point of view. There is, in particular, a dearth of legal analyses covering all aspects of Pakistani media law in a single document.

The document you have in your hands is the result of an intense process of research, consultation and analysis, and represents a go-to document for understanding media law in Pakistan. It provides a bird's eye, skeleton view of this immensely rich and detailed area of law, which cannot be subjected to either undue generality or simplistic treatment. Media law in Pakistan is going through an evolutionary process where rapid change is, and has, taken place, for better or for worse. It can be claimed that this process has reached a tipping point – due to political and social developments – and that it could go in any direction from here. There is a need for holistic reform and overhaul of media laws, as well as the institutions, which regulate the media. This report should serve as an important starting point for such a process of reform.

This review provides an overview of legal developments which have taken place since the inception of the State of Pakistan, along with the historical background of many of the most contentious laws. It explains the root-cause of many of the challenges that the media and freedom of expression face in Pakistan and it also provides recommendations and directions for addressing these challenges.

The first chapter provides an overview of international standards relating to freedom of expression and the right to information. This starts with an analysis of the general guarantees of the right, as well as the scope of permissible restrictions on it. Subsequent sections of this Chapter provide an overview of international standards in relation to each of the thematic issues covered by the chapters in the Compendium as a whole.

Chapter II provides an analysis of the constitutional scope of the

freedom of expression rights of citizens, as well as the obligations which this imposes on the various governments within Pakistan. It begins with an analysis the text of key constitutional provisions and the way they have been interpreted by courts. Moreover, an X-ray of 'freedom of press' as it is understood and practised in Pakistan has also been provided, which among other things assesses the extent to which special rights are afforded to the media.

Chapter III is dedicated to the foot soldiers of free speech: those who make a living out of exercising this fundamental human right, namely journalists and media workers. An important focus of the chapter is on the employment and labour laws which are applicable to journalists. In Pakistan, known for having become and for tolerating being a death trap for journalists, safety and protection rules for journalists remain in disarray or are non-existent. Specific laws and systems providing protection to journalists working in dangerous environments remain non-existent. This chapter also presents a review of self-regulation and self-help systems provided by journalists' associations.

Print media remains a thriving business in Pakistan, unlike in many developed countries, where digital media and technology companies, such as Google, have revolutionised how people access and consume news. Chapter IV is dedicated to analysing the laws regulating the print media. These laws, in a nutshell, remain arcane, burdensome and out-dated. The discussion of ethical codes of conduct, essential to the integrity and professionalism of media organisations, is also covered, as this remains an area in dire need of industry-wide reform.

One of the most technical areas of media law is the set of rules governing broadcasters, a sector which has seen exponential growth in Pakistan over the last decade, and which is given detailed treatment in Chapter V. This chapter provides an analysis of broadcast regulation, and it probes into a number of technical areas. Competitive issues are also discussed, along with an in-depth analysis of licensing rules, spectrum management, ownership rules and the legal framework governing the transition from analogue to digital transmission systems.

Chapter VI addresses public service broadcasting (PSB), which is an invaluable part of a democratic media ecology. While a huge amount of public money is spent on PSBs in Pakistan, they remain largely undemocratic, non-pluralistic and non-inclusive. The need for reform of PSBs in Pakistan is greater than for any other media institution.

Chapter VII somehow lies at the heart of this report. It reviews the many restrictions on the content of what may be printed or published in Pakistan, many of which apply across different expressive mediums. It reveals a wide range broadly worded and vague restrictions, which the courts have not done enough to narrow in scope through interpretation.

Telecommunications are playing an increasingly central role in facilitating an ever-growing range of expressive opportunities. Chapter VIII analyses Pakistan's telecom policy and the regulatory bodies which oversee it. The system is highly problematical. It was hoped that with the advent of telecommunications and the Internet, the space for freedom of expression would automatically be expanded due to the unique nature of these new mediums. However, the government has failed to break away in this sector from the tainted past of repressive laws that stifled free speech. The analysis reflects the fact that successive Pakistani governments tend to resist the logic of evolution and more often than not embrace and espouse draconian policies restricting freedom of expression.

The right to information (RTI) is an evolving constitutional right. Chapter IX analyses some of the key federal and provincial legislation relating to RTI. Because these laws are relatively new in Pakistan, there is a dearth of judicial precedent on the subject matter, so the analysis is largely text-based. The chapter also analyses key secrecy laws which restrict the scope of the right to information laws, and which tend to undermine the constitutional imperatives of granting access to information.

HISTORY OF PAKISTAN'S MEDIA LAWS

Media laws in Pakistan have had a roller coaster of a history, on the one hand, and a uniformly anti-free speech orientation, on the other. What this means is that while it ebbs and flows, there has been a consistent trend against adopting expansive or protective free speech laws. The founder of Pakistan, Muhammad Ali Jinnah, was throughout his while life a pro-free speech activist. During the colonial rule, he coined the term 'black laws' for the laws, which imposed excessive restrictions on free speech. He probably could not imagine an independent government having undue control and even a monopoly over the media, thereby marginalising dissenting voices and projecting pro-government voices across the board.

In a historical context, soon after the shift of power from civilians to military rule, laws were adopted by the military regimes to stifle those voices which opposed singular rule. This typified the reigns of presidents Ayub and Zia. The civilian governments in between failed to wholly repeal draconian laws restricting free speech, whether adopted pre- or post-independence.

Media researchers and scholars frequently highlight the supposedly substantial difference between two periods for media law and practitioners in Pakistan: the pre- and post-2002 periods.[1] The post-2002 period is remarkable for its liberalisation of the airwaves, giving rise to Pakistan's now robust broadcasting industry. During this time, access to information also gained constitutional recognition through Article 19-A of the Constitution of Pakistan, 1973, while the Freedom of Information Ordinance was adopted in 2002. However, as this review demonstrates, the promise of 2002, namely media liberalisation, did not realize its attendant values of free speech and diversity of voices. Instead of progress, there are growing restrictions on free speech and pluralistic content. Media law reforms have not been attempted seriously at any level. Instead, the previous patchwork of laws restricting content and access to it on various mediums continue to hold sway, despite the unstoppable technological changes taking place globally.

CHAPTER 1

MEDIA REGULATORY FRAMEWORK: INTERNATIONAL STANDARDS AND BEST PRACTICES

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Freedom of Expression Under International Law

I. Freedom of expression is a core human right which is guaranteed under international law and by virtually every constitutional bill of rights around the world. It is key to human development, dignity, personal fulfilment and the search for truth, and a fundamental pre-requisite for democracy and good governance.

ii. The right to freedom of expression is recognised in all of the main general international and regional human rights instruments and treaties. This includes, most notably, the Universal Declaration of Human Rights (UDHR),[2] which is considered to be the flagship statement of international human rights. The UDHR was adopted unanimously through a United Nations General Assembly resolution in 1948 and, as such, is not formally legally binding on States. However, its guarantee of freedom of expression is widely regarded as having acquired legal force as customary international law.[3]

iii. Article 19 of the UDHR states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

iv. Many core characteristics of freedom of expression flow directly from the language of Article 19 of the UDHR, including that the

[2] UN General Assembly Resolution 217A(III), 10 December 1948. Available in various languages at: http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx.
[3] See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase),* ICJ Rep. 1970 3 (International Court of Justice) and Namibia Opinion, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

right belongs to everyone, that it applies regardless of the means used to disseminate the expression, that it includes not only the right to impart but also to seek and receive information and ideas, and that it applies regardless of frontiers. Decisions by international courts have also made it clear that the right to express oneself encompasses not only speech which is generally accepted or is respectful in tone but also controversial or offensive speech. This was made clear by the European Court of Human Rights (ECHR) in the case of Handyside v. United Kingdom:

> [F]reedom of expression ... is applicable not only to "information" or "ideas" that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[4]

v. The *International Covenant on Civil and Political Rights* (ICCPR)[5] is a legally binding treaty ratified by 168 States as of June 2016, including Pakistan. The guarantee of freedom of expression in the ICCPR is very similar to the one in the UDHR. It even appears in the same provision, namely Article 19 of the ICCPR, which states in part:

> (1) Everyone shall have the right to freedom of opinion.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

vi. There are three regional systems for the protection of human rights, in Africa, in the Americas and in Europe. Freedom of expression is

[4] *Handyside v. United Kingdom,* 7 December 1976, Application no. 5493/72, para. 49.
[5] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976. Available at: www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

guaranteed in the main general human rights treaties in each of these systems, specifically at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),[6] at Article 13 of the American Convention on Human Rights (ACHR),[7] and at Article 10 of the *European Convention on Human Rights* (ECHR).[8]

vii. As is clear from the text above, treaties and high-level human rights instruments only provide very brief statements of the right to freedom of expression which is an extremely complex right. A number of bodies are tasked with interpreting this right. Globally, there is the UN Human Rights Committee, created by the ICCPR and given a formal role in interpreting its provisions. It does this in a number of ways, including through individual cases[9] and General comments on different rights.[10]

viii. The three regional treaties noted above are all subject to authoritative interpretation by, respectively the African Commission on Human and Peoples' Rights,[11] the Inter-American Court of Human Rights[12] and the European Court of Human Rights.[13]

ix. There are also four special international officials tasked with promoting and supporting freedom of expression, namely the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of

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[6] Adopted 26 June 1981, in force 21 October 1986. Available at: http://www.achpr.org/instruments/achpr/.
[7] Adopted 22 November 1969, in force 18 July 1978. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.
[8] Adopted 4 November 1950, in force 3 September 1953. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[9] The decisions of the UN Human Rights Committee in individual cases can be found at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=17.
[10] General comment No. 34 is the most recent one on Article 19 of the ICCPR, adopted on 12 September 2011. Available in various languages at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en.
[11] http://www.achpr.org/communications/.
[12] Its decisions are available at: http://www.corteidh.or.cr.
[13] Its decisions are available at:http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"documentcollectionid2":["CASELAW"]}.

Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. These special international mandates have adopted a Joint Declaration on a freedom of expression theme every year since 1999.[14]

x. It is recognised under international law that freedom of expression is not an absolute right and that it may, in appropriate cases, be restricted. The test for whether or not a restriction on freedom of expression is justified is found in Article 19(3) of the ICCPR, which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

xi. This test is strict, with narrowly drawn conditions. In General comment No. 34, the UN Human Rights Committee stated:

> Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. [references omitted][15]

xii. The first part of the three-part test is that a restriction must be in accordance with a law. This includes primary legislation, as well as regulations and other legally binding documents adopted pursuant

[14] The Joint Declarations are available at: http://www.osce.org/fom/66176 and http://www.law-democracy.org/live/legal-work/standard-setting/.
[15] General comment No. 34, note 10, para. 22.

to primary legislation. This would include, for example, a binding code of conduct for the media adopted by a broadcast regulator pursuant to broadcasting legislation.

xiii. It is not enough simply to have a law; the law must also meet certain standards of clarity and accessibility. If restrictions are unduly vague, or grant excessively discretionary powers of application to the authorities, they fail to meet the main purpose of this part of the test, namely to limit the power to restrict freedom of expression to the legislature. Unduly vague rules may also be interpreted in a manner which gives them a wide range of different meanings, resulting in a 'chilling effect', whereby individuals steer far clear of controversial topics because there is uncertainty about what is permitted and what is not. As the UN Human Rights Committee stated in General comment No. 34:

For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[16]

xiv. Second, the restriction must serve a legitimate aim. Article 19(3) of the ICCPR sets out the list of legitimate aims: respect for the rights and reputations of others, protection of national security, public order, public health or morals. The Committee has made clear that this list is exclusive, so that restrictions which do not serve one of the listed aims are not valid.

xv. Third, the restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

[16] General comment No. 34, note 10, para. 25.

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[17]

xvi. Courts have identified three aspects of this part of the test. **First,** restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. **Second,** restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). **Third,** restrictions must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two factors, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected.

xvii. The UN Human Rights Committee has summarised these conditions as follows:

> Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". [references omitted][18]

[17] See, for example, *Thorgeir Thorgeirson v. Iceland,* 25 June 1992, Application no. 13778/88, para. 63.
[18] General comment No. 34, note 10, paras. 34 and 35.

Regulation of Journalists

Licensing of Journalists

It is clear that international law does not permit States to impose limitations on who may practise as a journalist or to require journalists to belong to a particular association or to be licensed or registered. The UN Human Rights Committee has made it clear that this applies to all types of journalists:

> Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3.[19]

ii. In their 2003 Joint Declaration, the (then) three special international mandates for protecting freedom of expression supported this, stating:

> Individual journalists should not be required to be licensed or to register.
>
> There should be no legal restrictions on who may practise journalism.[20]

iii. Similarly, the Inter-American Declaration rules out specific types of entry requirements for the profession of journalism:

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.[21]

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[19] General comment No. 34, note 10, para. 44.
[20] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.
[21] Principle 6.

iv. This issue was explored in detail in a 1985 opinion of the Inter-American Court of Human Rights, which rejected completely the idea that States could impose conditions on the profession of journalism.[22]

Accreditation

i. Notwithstanding the prohibition on licensing journalists, it is widely accepted that it may be appropriate to provide accreditation to journalists where this is necessary to enable them to gain access to limited space or restricted access venues, in particular parliament but sometimes also the courts and/or scenes of accidents or crimes. As the UN Human Rights Committee has stated:

> Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.[23]

ii. Similarly, in their 2003 Joint Declaration, the special international mandates stated:

> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.
>
> Accreditation should never be subject to withdrawal

[22] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC 5/85 of 13 November 1985, Series A, No. 5.
[23] General comment No. 34, note 10, para. 44.

based only on the content of an individual journalist's work.[24]

Protection of Sources

i. International law provides strong protection for the right of journalists and others who provide the public with information of public interest to refuse to divulge their confidential sources of information. This is important since, if journalists are not able to offer real protection for confidentiality for those who seek it, those individuals are unlikely to approach journalists in the first place and the information they relay would no longer be publicly available. The real interest being protected here is, therefore, the right of the public to seek and receive information and ideas.

ii. The basic rationale for protection of sources was set out very clearly in a case before the European Court of Human Rights, *Goodwin v. United Kingdom,* as follows:

> Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[25]

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[24] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.
[25] 27 March 1996, Application no. 17488/90, para. 39. See also: General comment No. 34, note 10, para. 45.

Media Regulation: General Part

Independence

i. Under international law, there are two key overriding principles governing media regulation. The first is the idea that bodies which exercise regulatory powers over the media need to be independent of the government and protected against both political and commercial interference. The rationale for this is evident: if regulators are controlled by the government, they are likely to make regulatory decisions which favour the government of the day rather than the wider public interest. It is equally important that regulators are independent of the sectors they regulate, for essentially the same reason: if industry controls the regulator, it will operate with a bias towards industry, rather than making decisions in the wider public interest.

ii. Numerous international statements by authoritative actors support the need for independence of bodies with the power to regulate the media. A broad statement of the need for independence is the following quotation from a 2003 Joint Declaration of the then three special international mandates on freedom of expression:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[26]

iii. In its September 2011 General comment on Article 19 of the ICCPR, the UN Human Rights Committee made a similar statement albeit limited to broadcast regulators:

> It is recommended that States parties that have not already done so should establish an independent and

[26] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.

> public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses. [references omitted][27]

iv. All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also referred to this idea. For example, the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration),[28] adopted in 2003, states very clearly, at Principle VII(1):

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

v. An entire recommendation of the Council of Europe is devoted to this issue, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).[29] The very first substantive clause of this Recommendation states:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

vi. Recognising the principle of independent regulation is one thing, but guaranteeing it in practice is quite another, and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice.

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[27] General comment No. 34, note 10, para. 39.
[28] Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[29] Adopted by the Committee of Ministers of the Council of Europe on 20 December 2000. See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted 26 March 2008.

Diversity

i. The second internationally recognised principle regarding media regulation is the need for such regulation to promote diversity. Jurisprudentially, the principle of media diversity derives from the multi-dimensional nature of freedom of expression which, as noted above, protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas). This places a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public.

ii. Pluralism has received extremely broad endorsement as a key aspect of the right to freedom of expression. For example, the UN Human Rights Committee has stated:

> As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.[30]

iii. Similarly, the African Declaration states:

> Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.[31]

iv. The Inter-American Court of Human rights has recognised that the right to seek and receive information and ideas requires the existence of a free and pluralistic media:

> It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all

[30] General comment No. 34, note 10, para. 14.
[31] Principle III.

> monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.[32]

v. Within Europe, the issue of media diversity as an aspect of the right to freedom of expression has attracted considerable attention. In a 2012 case, Centro Europa 7 S.R.L. and Di Stefano v. Italy, a Grand Chamber of the European Court of Human Rights set out in some detail the key principles governing this idea:

> 129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.
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> 130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall program content, reflecting as far as possible the variety of opinions encountered in the society at which the programs are aimed.
>
> 134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive

[32] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 22, para. 34.

> obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly. [references omitted][33]

vi. The Court referred to the Council of Europe's Recommendation 2007(2) on Media Pluralism and Diversity of Media Content,[34] which is entirely devoted to the question of media diversity and measures to promote it.

vii. The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression focused entirely on media diversity.[35] The Joint identified three distinct aspects of media diversity: content, outlet and source.[36] **Diversity of content,** in the sense of the provision of a wide range of content that serves the needs and interests of different members of society, is the most obvious and ultimately the most important form of diversity. **Diversity of content,** one aspect of which is giving voice to all groups in society, depends, among other things, on the existence of a plurality of types of media, or outlet diversity. Specifically, democracy demands that the State create an environment in which different types of broadcasters – including public service, commercial and community broadcasters – which reflect different points of view and provide different types of programming, can flourish. The absence of **source diversity,** reflected in the growing phenomenon of concentration of media ownership, can impact in important ways on media content, as well as independence and quality.

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[33] 7 June 2012, Application no. 38433/09. See also See, for example, *Informationsverein Lentia and Others v. Austria,* 24 November 1993, Application nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

[34] Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

[35] Adopted 12 December 2007. Available at: http://www.osce.org/fom/66176.

[36] See also: Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

Regulating the Print Media

Licensing and Registration

i. There is an important distinction, in terms of the regulation of the print media, between licensing systems – which require the prior authorisation of a regulatory authority or the government, which might be withheld – and registration requirements, which oblige those who wish to publish a newspaper to provide certain information to the regulator before they begin. It is clear that, under international law, licensing regimes for newspapers are not legitimate. In General comment 34, for example, the UN Human Rights Committee stated:

> It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3.[37]

ii. Many democracies do not impose any sort of formality or condition on establishing a newspaper. Indeed, with the advent of the Internet and modern forms of publication, it is challenging even to define what is a newspaper. Objectives such as keeping statistics about newspapers and providing individuals with information about how to obtain legal redress should they be defamed or otherwise harmed by a publication can be achieved in other, less intrusive, ways.

iii. Where States do impose registration requirements on the print media, they must meet certain conditions. As the special international mandates stated in their 2003 Joint Declaration:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow

[37] General comment No. 34, note 10, para. 39.

for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[38]

Rights of Correction and Reply

i. The right of reply is a contentious issue in media law. It is not disputed that the right represents a prima facie interference with freedom of expression, which would need to be justified pursuant to the three-part test for restrictions.[39] Some observers see it as justifiable measure which actually improves the free flow of information by ensuring that the public will hear both sides of the story and by preventing costly defamation suits. Others regard it as an impermissible restriction on editorial freedom.

ii. To provide guidance to Member States on this issue, the Committee of Ministers of the Council of Europe adopted a resolution on the right of reply in 1974.[40] It recommends that the right should be recognised, but only for factually incorrect statements, and with the following exceptions:

    i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
    ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
    iii. if the reply is not limited to a correction of the facts challenged;
    iv. if it constitutes a punishable offence;
    v. if it is considered contrary to the legally protected interests of a third party;
    vi. if the individual concerned cannot show the existence of a legitimate interest.

[38] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176.
[39] See, for example, Ediciones Tiempo S.A. v. Spain, 12 July 1989, Application no. 13010/87 (European Commission of Human Rights) and *Enforceability of the Right to Reply or Correction,* Advisory Opinion to the Government of Costa Rica, 29 August 1986, OC-7/86, Ser. A, No.7 (Inter-American Court of Human Rights).
[40] Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974.

Complaints Systems

i. It is widely recognised that members of the public should be able to lodge complaints where they are of the view that the media has not acted in a professional manner. Different systems have evolved to meet this need. Purely self-regulatory systems, by which is meant systems that lack any statutory basis and that are established by the media on a voluntary basis, are in place in many countries. These systems differ, but the vast majority assess complaints against a code of conduct or some other set of pre-established standards, often set by leading members of the media sector to which the system applies. Most also involve a council or other body to decide on complaints, which often includes not only members of the media but also representatives of the public as a whole. In other countries, co-regulatory systems have been put into place. These normally involve statutory bodies in which the media play a dominant or at least very significant role. As the African Declaration makes clear:

> Effective self-regulation is the best system for promoting high standards in the media.[41]

Regulation of Broadcasting

i. Under international law, States are allowed to impose more stringent regulatory regimes on broadcasting than on other forms of media. This is because, unlike print media, broadcast signals have traditionally been distributed through a limited public resource, the radio frequency spectrum. Without regulatory intervention in assigning frequencies to broadcasters, chaos would reign and interference would render the entire system unworkable, although modern technologies are starting to change this. At the same time, there are other reasons to regulate broadcasters, including the intrusive and influential nature of broadcasting, as well as its accessibility, including to children.

ii. The two main areas of broadcast regulation are in relation to licensing and regulation of content.

[41] Principle IX(3).

Licensing

i. Under international law, the licensing process should be carried out by an independent body and done in a democratic manner and, in particular, it should be fair and transparent. The importance of achieving these goals has been outlined by the UN Human Rights Committee in its General comment No. 34:

> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and license fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters.[42]

ii. The process for making applications should be set out clearly and precisely in law. A framework of rules should be provided for in the primary legislation, with more detail specified in subordinate regulations, including specific calls for tenders or applications. The framework should at least include the following features:
    - Clear timelines for each step of the process (such as deadlines for filing applications and the length of time it will take for a decision to be made).
    - A detailed explanation of the process and a requirement for the regulator to justify any refusals in writing.
    - A clear framework or schedule of any charges and fees.
    - Clearly stated criteria by which applications will be assessed, such as technical expertise, financial resources and making a contribution to diversity.

[42] General comment No. 34, note 10, para. 39.

iii. Applicants should also have a right to a judicial appeal against any refusals to issue a license.[43]

Regulation of Content

i. To ensure that the public has access to a range of different types of programming, many countries impose certain positive content obligations on broadcasters. One common example is to require broadcasters to carry a certain amount of domestic programming. The rationale behind this is to counteract commercial incentives to purchase content from abroad, which is often cheaper and easier than producing original programs. In many countries, national broadcasters are also required to carry a certain minimum percentage of local programming. Once again, this is to counteract commercial imperatives, since it is more expensive to produce different local programs for different areas than to provide unified national programming. Another requirement is for broadcasters, especially public broadcasters but also often private broadcasters, to carry programming which is produced by independent producers (i.e. producers who are not connected to any institutional broadcasting station). This broadens the production base, leading to a more intense competition of ideas and innovation in the sector and, as a result, greater content diversity.

ii. In most democracies, broadcasters are also subject to certain negative or minimum professional requirements. This normally means that they are required to respect the standards set out in a code of conduct. These codes address a range of programming issues, such as accuracy, privacy, protection of children and the treatment of sensitive themes such as sex and violence. In most democracies, broadcasters are required to treat matters of public controversy with due balance and impartiality, which essentially makes it unrealistic for broadcasters to be owned by or even linked to a particular political party. These codes often form the basis of a complaints system and the sanctions applied for breach of the rules

[43] See *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation,* Article 19, 2002. Available at: https://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf,

range from light remedies (such as warnings or requirements to issue a correction) to more serious remedies (such as fines and even the possibility of license revocation).

Public Media

i. In many countries, broadcasters which are publicly owned have often been subject to government control. The notion of public service broadcasting posits another approach: publicly owned broadcasters which operate independently of government control and which serve the wider public interest, complementing and extending the services offered by commercial broadcasters, thereby contributing to media diversity.

ii. The main reason why independence is so important for public broadcasters has been elaborated on eloquently by the Supreme Court of Ghana: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[44]

iii. This vision of independent public broadcasting is clearly supported by international law, as is clear from the following quote from the UN Human Rights Committee:

> States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence. [references omitted][45]

iv. This principle finds support in statements by regional human rights bodies as well. The African Declaration

[44] *New Patriotic Party v. Ghana Broadcasting Corp.,* 30 November 1993, Writ No. 1/93, p. 17.
[45] General comment No. 34, note , para. 16.

highlights the importance of independence for public broadcasters, calling for State and government controlled broadcasters to be transformed into public service broadcasters.[46] The most comprehensive such statement is Recommendation (1996)10 on the Guarantee of the Independence of Public Service Broadcasting, passed by the Committee of Ministers of the Council of Europe,[47] which was followed by a Declaration on the same issue ten years later.[48] The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasters, and the recommendation provides detailed guidance on how this is to be done in practice.

v. In practical terms, protecting the independence of public broadcasters is complex and is achieved in many of the same ways as protecting the independence of broadcast regulators, namely through measures to ensure that their governing bodies and funding are independent.

vi. Independence does not mean lack of accountability, and in many democracies accountability of public broadcasters is primarily through the submission of an annual report to parliament, as well as more direct accountability systems, such as public surveys and direct stakeholder meetings.

vii. Many public broadcasters are required to be balanced and impartial, particularly in relation to their news and current affairs programming. Thus, the African Declaration calls for public service broadcasters to be under an "obligation to ensure that the public receive adequate, politically balanced information".[49] Council of Europe Recommendation (1996)10 calls for the legal framework to require public broadcasters to "ensure that news

[46] Principle VI.
[47] Adopted 11 September 1996.
[48] Declaration of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in the member states, 27 September 2006.
[49] Principle VI.

programs fairly present the facts and events and encourage the free formation of opinions."[50]

viii. If public broadcasters are to be able to fulfil a true public service mandate, they need to benefit from public funding. It is not realistic to call on these broadcasters to provide special services and functions and yet not to provide them with the wherewithal to do so. At the same time, true independence for public broadcasters is possible only if funding is secure from arbitrary government control. The African Declaration states: "public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets."[51] Recommendation (1996)10 of the Council of Europe notes that funding arrangements should not be used "to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy" of public service broadcasters. The level of funding should take into account trends in the costs of its activities. Furthermore, payment should be effected in a manner which "guarantees the continuity of the activities" of the broadcaster and allows it to "engage in long-term planning".[52]

Content Restrictions

i. There are numerous possible content restrictions and it is beyond the scope of this chapter to go into detail into all of them. Instead, a few points about the leading areas of restriction are made.

Defamation

i. Although many countries use the criminal law to protect reputations, this is unnecessary and, under international law, rules on defamation and insult should be civil in nature. As the UN Human Rights Committee has put it:

> The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the

[50] Principle VI.
[51] Principle VI.
[52] Principle V.

> government can never be considered to be a necessary restriction of freedom of expression.
> …
> States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. [references omitted][53]

ii. A large number of defamation cases have come before international courts and a number of principles can be drawn both from these cases and from other authoritative international statements. The 2000 Joint Declaration by the special international mandates contains the most detailed single statement on standards for defamation laws, as follows:

> At a minimum, defamation laws should comply with the following standards:
> - The repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
> - the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
> - defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as desacato laws, should be repealed;
> - the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
> - no one should be liable under defamation law for the expression of an opinion;
> - it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all

[53] General comment No. 34, note , paras. 42 and 47.

the circumstances; and

- civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.[54]

Privacy

i. Two international standards are of particular relevance for privacy. First, the concept must be defined in an appropriate manner in national legislation. International courts have often avoided attempts to define the concept. For example, the European Court of Human Rights has stated: "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'."[55] However, it should be defined narrowly when it comes into conflict with the freedom of expression rights of third parties. For example, many right to information laws expressly exclude information concerning the work-relating functions of an individual from their exceptions for privacy.

ii. Second, and even more important, when the right to freedom of expression comes into conflict with privacy, decision-makers, including courts, should balance the overall interest in protecting privacy against the interest in allowing the expression. The European Court of Human Rights has provided a reasonably exhaustive elaboration of the principles to be taken into account in this balancing exercise. The first of these is the extent to which the publication contributed to a matter of public interest, which depends on all of the circumstances. Other factors referred to by the Court, which largely appear to be an elaboration of the first, public interest, criterion, include the following:

    - the degree of fame of the person involved and the subject of the

[54] Adopted 30 November 2000. Available at: http://www.osce.org/fom/66176.
[55] *Niemietz v. Germany,* 16 December 1992, Application no. 13710/88, para. 29.

report;
- the prior conduct of the persons involved;
- the content, form and consequences of the publication; and
- the circumstances in which the alleged invasion of privacy took place.[56]

National Security

i. It is incumbent on States to safeguard national security and public order, failing which they would not be in a position to protect human rights or democracy itself. At the same time, abuse of this duty has been rife in many States around the world. International courts and leading commentators have applied three main measures to prevent abuse of national security and public order rules. First, they have insisted that these concepts, and national security in particular, not be defined in an unduly broad manner. The UN Human Rights Committee, for example, has stated:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. …
>
> Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities. [references omitted][57]

[56] Von Hannover v. Germany (No. 2), 7 February 2012, Applications nos. 40660/08 and 60641/08, paras. 109-113.
[57] General comment No. 34, note , paras. 30 and 46.

ii. Second, they have insisted on a clear intent requirement, consistently with basic criminal law principles. The European Court of Human Rights has, for example, stated in a case involving a conviction for publishing a poem:

> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.[58]

iii. Third, they have insisted on a very close causal relationship, or close nexus, between the expression and the risk of harm. In this regard, Principle XIII(2) of the African Declaration states:

> Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

Other Interests

i. There are a number of other interests which may justify restrictions on freedom of expression under international law. Some of the more common are:

- Hate Speech: Article 20(2) of the ICCPR places an obligation on States to prohibit hate speech, as follows:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

ii. In a 2001 Joint Statement on Racism and the Media, the special international mandates set out a number of conditions which hate

[58] *Karataş v. Turkey,* 8 July 1999, Application no. 23168/94, para.

speech laws should respect:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.[59]

- Morals

iii. Most States have in place certain restrictions on freedom of expression to protect public morals, such as rules on obscenity. While it is accepted that what constitutes an appropriate limitation on freedom of expression to protect morals does vary from society to society, at the same time there are limits to this. As the UN Human Rights Committee has stated:

> The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination. [references omitted][60]

[59] Adopted 27 February 2001. Available at: https://www.article19.org/resources.php/resource/1801/en/joint-declaration-on-racism-and-the-media.
[60] General comment No. 34, note , para. 32.

- The Administration of Justice

iv. It is well established under international law that court hearings should be open to the public. Two interests come up in this context. The first, and more important, is protection of the impartiality of the judicial system. It is clearly legitimate to prohibit certain types of expressions to this end, such as intimidating witnesses, acting in a manner which disrupts court processes or lying to the court. A second interest is protection of the 'authority' of the judicial system. In many countries, this has been interpreted as justifying protection for the reputation of the courts or even individual judges. However, the real interest recognised here is ensuring that individuals accept the courts as the proper forum for final arbitration of social disputes. In most democracies, restrictions on freedom of expression to protect the authority of the courts are no longer applied on the basis that they are not necessary. A Canadian case, which involved a lawyer, an officer of the courts, stating to the media that he had lost faith in the ability of the judicial system to render justice, provides an eloquent description of the reasons for this:

> As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not feliciously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy…. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions.[61]

[61] *R. v. Koptyo* (1987), 62 OR (2d) 449, p. 469.

The Right to Information

i. The right to access information held by public bodies was not yet recognised as a human right when the UDHR and ICCPR were adopted. However, subsequent developments have led to the recognition of this right as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to 'seek' and 'receive' information and ideas. This was highlighted relatively early on by the special international mandates on freedom of expression, who included the following statement in their 1999 Joint Declaration:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[62]

ii. The Inter-American Declaration unequivocally recognises the right to information stating, in paragraph 4:

> Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

iii. The right to information was similarly recognised in both the African Declaration[63] and in Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents,[64] which is devoted entirely to the issue.

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[62] 26 November 1999. Available at: http://www.osce.org/fom/66176?page=1.
[63] Principle IV.
[64] 21 February 2002. It should be noted that this document focuses more on the content of the right to information than on specifically recognising it as a human right.

iv. Formal recognition of the right to information by international courts came a little bit later. The first such court to do so was the Inter-American Court of Human Rights, in the 2006 case of *Claude Reyes and Others v. Chile.*[65] In that case, the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the ACHR, included the right to information.[66]

v. It took a few more years but, in April 2009, the European Court of Human Rights followed suit, recognising a right to information based solely on Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression.[67] The UN Human Rights Committee was relatively late to recognise clearly the right to information. However, in its 2011 General comment it did just this, stating:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[68]

vi. An important statement of the content of the right to information is the RTI Rating, developed by the Centre for Law and Democracy and Access Info Europe.[69] The RTI Rating is composed of 61 Indicators broken down into seven main categories, namely: Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections and Promotional Measures.

[65] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151.
[66] Ibid., para. 77.
[67] *Társaság A Szabadságjogokért v. Hungary,* 14 April 2009, Application no. 37374/05.
[68] General comment No. 34, note , para. 18.
[69] Available at: www.RTI-Rating.org.

CHAPTER 2

FREE SPEECH – CONSTITUTIONAL FRAMEWORK OF PAKISTAN

FREE SPEECH – CONSTITUTIONAL FRAMEWORK OF PAKISTAN

Comparing with the International/Regional Standards of Free Expression

Introduction

i. Freedom of expression as a right, that is equated with the right of habeas corpus, right against cruel and inhumane punishment or torture, right of freedom of religion, the right to a fair trial, has perhaps the strongest claim for being a core human right in international jurisprudence,[70] but has been the most battered, curtailed and ignored right, in various contexts, in the entirety of Pakistan's political and constitutional history.

ii. The Courts, as we would in detail discuss, have not been very helpful in explicating 'the grounds, scope and force' of the right to freedom of speech vigorously and jealously. Even constitutional obligations suffer from vagueness at conceptual level. Whatever clarity new laws and amendments might have brought, many of the core issues and elements of the right remain unresolved, uncontested and ignored. For instance, it remains unresolved to what activities or actus rea (i.e. physical act of crime or violation) does it apply to; does it protect merely specific, conventional activities, such as writing and speaking, or does it cater to more symbolic and indirect ways of communication? Does it protect any conduct or activity that intends to communicate a message or an idea?

iii. Freedom of speech is internationally recognized as one of the most important human rights, elemental to the proper functioning of a healthy democracy and to the exercise of many other rights. According to the Universal Declaration of Human Rights, Article 19:

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[70]Daniel P. L. Chong, Debating Human Rights. Lynne Rienner Publishers, Inc. (March 12, 2014), p. 131-33.

a. *"Everyone has the right to freedom of opinion and expression."*

iv. On same footing, the First Amendment to the US Constitution also protects freedom of thought, religion, speech, and protest, as well as all other developed jurisdictions. However, traditionally even Western jurisdictions and international law have often recognized that free speech may be subject to some restrictions and regulations as long as they do not infringe upon rights of others. For instance, Justice Oliver Wendell Holmes's in Schenck v. United States[71] noted that no one is permitted to cause danger to the public by shouting "fire" in a crowded theatre, or to gravely harm a person's reputation by spreading lies about them, or to use their speech to incite people to commit a violent crime. In a recent US Supreme Court case, widely reported in Pakistan law journals as well, the Court held online Facebook lyrical and poetic statuses that threatened ex-wife of a person to be unprotected speech.[72]

v. In international law, the International Covenant on Civil and Political Rights acknowledges that free speech "carries with it special duties and responsibilities" and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) For respect of the rights or reputations of others; or b) For the protection of national security or of public order, or of public health or moral." These international principles grant States some small degree of leeway in deciding how to limit content and regulate free speech according to the social and cultural context of a society.

vi. Freedom of expression as a constitutional principle for Pakistan was first incorporated in the Objectives Resolution, adopted in 1949, which has served more as a preamble than as a binding provision, which stated:

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[71] 249 U.S. 47 (1919)
[72] 2015 SCMR 1192ANTHONY DOUGLAS ELONIS vs. US

> *"Wherein shall be guaranteed fundamental rights, including ... freedom of thought, expression ... subject to law and public morality..."*

Article 19 of the Constitution of Pakistan, 1973

Article 19 is the provision in the Constitution of Pakistan, 1973, that protects freedom of speech, and qualifies the right in following manner:

> *19 Freedom of speech, etc. "Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence."*

General Principles of Freedom of Expression

i. Pakistani Courts have never been tired of stating the importance of freedom of expression and speech and generally recognize the right to be cornerstone of democratic institutions. The newspapers, magazines and other journals are viewed to be providing public service by 'shedding light on public affairs'. Courts have viewed such 'informed public opinion' has the most effective of all restraints upon misgovernment and suppression or abridgement of such activity is a grave concern, without stating what the consequences should be for restraining the exercise. Courts have also held that the right to free speech implies right to receive information as well.[73] Nothing in the case law suggests that exercise of free speech is limited by the profile, age, background, etc., of the speaker, except that in one instance it held 'government servants' right to free speech in course of their service may be restricted to protect the aim of "proper discipline," and "efficient

[73]Right to receive may be more central than right to speak, because when a speech is restricted, the audience's rights are violated too. A speaker may die or may belong to another country, and if his message is restrained, the rights of the receiver are violated, in essence. However, it is the speaker who is in the better position to challenge the restriction or violation.

administration," upholding Rule 22 of the Government Service (Conduct) Rules, 1964, which states that a government official should not share any information publicly that may "embarrass the government."[74] Similar, restrictions may apply to workers or employees under contract.

ii. Pakistani courts have sometimes been critical of journalists, publishing value judgments or allegations. International law recognizes right of journalists, especially when performing public service, to make value judgments and exaggerated statements against public officials, the case is different when private persons and their right to privacy (or right to personal development) is concerned.[75] However, the Courts do not generally restrict political speech merely critical of government or the institutions. In Muhammad Sabir Ansari v. State,[76] the Court held:

> *i. "Detenus [were] detained allegedly for engaging in activities prejudicial to integrity, defence and security of State and further likely to do so on the basis of some alleged speeches made and slogans raised against Government and Army. Instigation of students and teachers (on strike) to disturb public peace and order [was] also alleged against detenu ... [Court ruled that] the criticism of government and military personnel ruling country in political way for restoration of democracy and putting forth public demands to them, do not constitute detention."*

iii. The Courts have consistently held Article 19 to be both a 'negative' right, i.e., a right not to be 'unreasonably' interfered with by the government or any agency, and also one creating a positive obligation on the government to protect the right. The rulings of the court have been on all kinds of information, conveyed through various platforms, mediums and forms. Generally, courts have

[74]Engineer Jameel Ahmed Malik Versus Pakistan Ordnance Factories Board, Wah Cantt, 2004 SCMR 164

[75]

[76]1983 PCRLJ 387

ruled against excessive government intervention in Article 19 speech. In Province of Sindh v. Muttahida Qaumi Movement,[77] Supreme Court held:

> *i."Freedom of speech and expression (Art. 19 of the Constitution) encased the right of an individual to express his views and opinions and engage in dialogue without fear of misplaced sanctions and State intervention, but simultaneously (included) the right to remain silent."*

Freedom of Press

i. Article 19 differentiates free speech from freedom of press, implying that the exercise of these two freedoms should be subject to different rules; however, it is not clear whether primacy should be given to press, as it is the case in jurisdictions such as United States, which recognize press to be political watchdog, deserving some kind of special sensitivity.

ii. The Courts have not denied that freedom of press is fundamental in a democracy, rather have reaffirmed its special status in numerous rulings, in fact it has been categorized as 'mother of all liberties in a democratic society'.[78] It is no accident that freedom of speech and freedom of press have been spoken of separately in the constitution. Constitution acknowledges the critical role press plays and has played in the society, in particular in satisfying the information needs of the public, and it thus requires sensitivity to the special needs of the press in performing its duties. This consideration is the rationale behind special access given to press in various places, such as parliament, courts, hearings, etc., without which it would not be able to inform the public about the events taking place there. This exception to 'equal access' is to accommodate practical difference between the public and press. However, there are no laws giving press special access to police records, or other government records for efficient reporting.

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[77]PLD 2014 SC 531

[78]2000 CLC 904. Also see, PLD 1989 Lahore 12.

iii. Beyond such symbolic treatment, the Courts have never ventured to grant preferential treatment, which is not given to 'ordinary citizens'. This is in line with the practice of courts such as of United States, which do not give a newspaper 'special immunity from the application of general laws' and 'no special privilege to invade the rights and liberties of others'.[79]

iv. Previously, defamation used to be part of the exceptions to free speech in Article 19. Subsequently, the word "defamation" was omitted and replaced with "commission of or incitement to an offence" by Constitution (Fourth Amendment) Act, 1975, thereby enlarging the scope of freedom of press. However, Courts held that the amendment did not give press a license to publish material prejudicial to interest, reputation, prestige and honour of a person.[80] Defamatory statements are actionable and are criminally punishable under Pakistan Penal Code. Claim of defamation against electronic media is regulated by Pakistan Electronic Media Regulatory Authority.

v. Right against blockage or suspension of T.V. channels has attracted the coverage of Article 19, as well. In a similar case, Supreme Court held that suspension of telecasting and transmissions of T.V. channels by cable operators violates Article 19 of the broadcasters and the viewers, as their right to receive information is infringed. Moreover, Court also held the unlawful suspension to be violating Article 20 ('freedom to profess religion and to manage religious institutions'), 24 ('protection of property rights'), 27 ('right against discrimination') and 28 ('preservation of language, script and culture').[81]

Restrictions

i. Courts have time and again held that Article 19 is not an 'absolute', 'unfettered', or 'unrestricted' right and can be qualified by putting 'reasonable restrictions.' Restrictions can be put to protect the aim enumerated in Article 19, as well as a host of other very broad,

[79] Associated Press v. NLRB 301 US 103, 132-3 (1937).
[80] PLD 2002 Supreme Court 514.
[81] Dr. Shahid Masood v. Federation of Pakistan. 2010 SCMR 1849.

sweeping and arguably vague aims, such as, "not infringing the rights of others,"[82] "damage prestige of individuals or of a country or a nation,"[83] "publish[ing information] based on truth,"[84] "public interest,"[85] "reputation of people," "friendly relations with foreign state,"[86] "public order, decency, or morality or provisions regarding contempt of Court,"[87] "disdain anti-State or un-Islamic publications,"[88] and "collective interests of the society, peace and security of the State and the maintenance of public order"[89] among other aims.

ii. In limiting overreach of government and executive vis-à-vis Article 19, Courts have made sweeping statements against such overreach, implying that conventional principles of judicial review against abuse of discretion and arbitraries will be applicable:

> "In determining reasonableness of the restrictions the prevailing condition at the time of legislation may be taken into account. From this, however, it does not follow that absence of manifestly disturbed condition by itself will be sufficient to strike down the legislation … The powers are indeed wide but they are to be exercised only if it were satisfied as to the necessity of using them for securing public safety … There cannot be any presumption that there will be abuse in the exercise of the powers. A case of mala fide exercise of power is always subject to judicial interference."[90]

General Test

i. Pakistani Courts have adopted "imminent and present danger" test developed by United State Supreme Court[91] as test for the

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[82]PLD 1975 Lahore 1198.
[83]1990 CLC 1500. The wording indicates that the right may be is beyond frontiers, applicable to any person coming within the jurisdiction of Pakistan's courts.
[84]PLD 2008 Karachi 558.
[85]PLD 2002 Supreme Court 514
[86]PLD 1998 Supreme Court 823.
[87]Ibid.
[88]Ibid.
[89]PLD 1965 Lahore 642.
[90]PLD 1965 Dacca 68.
[91]Mian Muhammad Nawaz Sharif v. President of Pakistan and others. PLD 1993 Supreme Court 473

reasonableness of the restriction on Article 19 rights, as following:

> *"Right of expression and speech is conferred by the Constitution and is regulated by law. Every restriction on free speech must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom of expression may be curtailed provided it is justified by the 'clear and present danger' test that the substantive evil must be extremely serious and the degree of imminence extremely high. The danger should 'imminently threaten immediate interference with the lawful and pressing purposes of the law' requiring immediate step to ensure security of the country. Speech would be unlawful if it is directed to inciting or producing imminent lawless action and is likely to produce such action. Speech and conduct are two different concepts. Speech relates to expression and conduct to action. Speech ends where conduct begins but if both are combined the Court has to draw the dividing line. The freedom of expression of views is curtailed or restricted when they threaten clearly and imminently to ripen into conduct against which the public has a right to protect itself."*

ii. Courts have been known to condition presence of imminent and clear danger as a test for other exceptions to free speech such as defamation, indecency, etc. to be valid. How this later judgment reconciles with previous opinions that made scope of obscenity and defamation laws wider is not clear. Courts have not, however, developed detailed and clear tests for restriction involving analysis of legitimacy, necessity and validity of legal instrument imposing restrain. The legal regime does create 'chilling effect' on speakers and press by not specifying in advance which speech might be prohibited. This does create the problem of lack of predictability, which laws should possess.

iii. There is a plethora of legal instruments available for government,

primarily unelected executive branch, to curtail free speech that gives it too much discretion. There are many statements in various statutes and court rulings which make free speech subject to vague qualifications such as "morality," "obscenity," "national integrity," "social values," etc. Such laws vest executive with too much power to regulate free speech.

Respect of Judicial Process

i. The Courts have also burdened the publishers, editors, authors and lawyers – engaging in their right to free speech – abstaining from "using strikingly pungent language which smacks of loud bitterness or aimed at emitting intemperate expression or abnormal understanding suggesting scandalization of the Court or obstruction to the impartial administration of justice."[92] Such broad and sweeping restriction on freedom of speech may be considered outline under jurisprudence of developed democracies. The Courts in Canada and U.S., for instance, allow such kind of critical speech when it comes to professional judges. However, it is pertinent to note that even US Supreme Court is ready to accept the idea that the freedom of press ought to be restricted when it threatens the requirement of fair and orderly administration of justice, especially comments 'of every character upon pending trials or legal proceedings may be as free as a similar after complete disposal of the litigation'.[93] Cardinal principle in United Kingdom was eloquently expressed in Ambard v. AG for Trinidad and Tobago[94] by Lord Atkin:

> *"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary man."*

National Security

i. The Courts have been emphatic about the overriding interest of protection of national security. The dominating position that

[92]Ibid. Further, the Court went on to warn, "It' appears necessary that citizens, editors or authors while making a speech or writing articles/editorials or arranging its publication must not use awkward or disrespectful language which may cause ridiculing or undermining the prestige of Court."
[93]Pennekamp v. Florida, 328 US 331 (1946).
[94][1936] AC 322, 335.

informs Courts' many decisions was expressed as following:

> *"Every inch of the territory of the State being more valuable than the liberty of speech and expression enjoyed by any of its citizens, such liberty cannot on any social, moral, legal or political ground be used as 'democratic' means of liquidating the State that has bestowed that liberty."*[95]

ii. Although this ruling pre-dates Article 19, it has not been overruled or qualified in subsequent case law. Courts have categorized threats to national security as that aimed at "overthrowing government, levying of war, causing rebellion, or creating external aggression," however, it excluded "minor breaches of public order or tranquility." Speech, which endangers security, is liable to be curbed.[96] Integrity of Pakistan and national security can only be invoked to restrict free speech if it meets the American "imminent, clear and present danger" test adopted in Mian Nawaz Sharif case, cited above.

Defamation

iii. Defamation is universally recognized exception to and restriction upon free speech.[97] It has long ceased to be a criminal offense in many developed democracies but remains a crime in most other countries, and is a civil action claim. However, in Pakistan defamation remains a criminal offense under the Pakistan Penal Code (PPC), 1860 sections 499-502, to be tried by Sessions Court. A tort/civil claim can also be pursued under the Defamation Ordinance, under civil court jurisdiction, for damages. The offence is categorized into conventional categories of libel and slander. The Ordinance also provides various defences, which are available in developed jurisdiction as well, such as fair comment, truthfulness,

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[95]PLD 1957 Lahore 142.
[96]PLD 1958 Peshawar 15.
[97]Article 19(3)(a) of ICCPR makes "respect of the rights or reputations of others" a valid and necessary restriction on free speech.

absolute and qualified privilege.[98] The case law has not extended protection against defamation to journalists when they make value judgments and exaggerated criticism of public officials, courts, etc.

Article 19-A of the Constitution of Pakistan, 1973

i. Pakistani Courts have long recognized right to receive information as an integral part of Article 19.[99] However, in 2010 the right to information was put on constitutional footing by inserting Article 19-A through Eighteenth Amendment, which states:

> ***"19A. Right to information.***—*Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."*[100]

ii. The law by making right to information a constitutional right has created an overriding effect in favour of access. Broad disclosure of government information is guaranteed in evolving case law. In Hamid Mir v. Federation of Pakistan,[101] The Supreme Court ordered disclosure of 'creation and utilization of secret funds in the Ministry of Information and Broadcasting', holding that, "Prima facie, in view of the provisions of Art.19A of the Constitution, Ministry of Information and Broadcasting was obliged to disclose the nature and use of all funds allocated to it including the secret funds."

iii. The Supreme Court has held Article 19-A necessary for enabling "every citizen to become independent of power centres, which heretofore, have been in control of information on matters of public

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[98]Section 6 of the Ordinance defines Absolute Privilege and Section 7 explains what constitutes Qualified Privilege. Absolute Privilege is "any publication of statement made in the Federal or Provincial legislatures, reports, papers, notes and proceedings ordered to be published by either house of the Parliament or by the Provincial Assemblies, or relating to judicial proceedings ordered to be published by the court or any report, note or matter written or published by or under the authority of a Government." Qualified Privilege is "any fair and accurate publication of parliamentary proceedings, or judicial proceedings, which the public may attend, and statements made to the proper authorities in order to procure the redress of public grievances." This means that if the matter falls under the definition of either of the privileges, absolute or qualified, it is legal to disseminate the information to the public.

[99]In Muhammad Nawaz Sharif vs. President of Pakistan (PLD 1993 SC 473), Supreme Court held, "[R]ight of citizens to receive information can be spelt out from the 'freedom of expression' guaranteed by Article 19 subject to inhibitions specified therein and such right must be preserved."

[100]Section 7 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted a new Art. 19A, after Art. 19 of the Constitution, (w.e.f. April 19, 2010).

[101]PLD 2013 Supreme Court 244.

importance," and that it is the Constitution which "has empowered the citizens of Pakistan by making access to information a justiciable right of the people rather than being largesse bestowed by the State at its whim."[102]

iv. In interpreting Article 19-A in a case[103] concerned with the suspension and closure of broadcasting and transmissions of certain TV channels in breach of its licensing and broadcasting rights, SC gave due regard to right to information, unsurprisingly, in conjunction with its right to free speech, as following:

> *"Weight attached to electronic media stems out of the fundamental rights of freedom of speech, expression and of press as guaranteed by Art. 19 of the Constitution. Equally important, if not more, the right of every citizen to have access of information in all matters of public importance as guaranteed by provisions of Art. 19-A of the Constitution."*

v. Without going into great detail about what qualifies as 'public importance', the Court nonetheless made an important and necessary statement about the implication of public's right to receive information with the right of a broadcaster to publish or air its programs, while exercising its right to free speech under Art. 19.

vi. Prior to enactment of Article 19A in the Constitution, the relevant law dealing with right to information on the statute books was the Freedom of Information Ordinance, 2002, which enumerates documents or 'record'[104] that the government is obligated to publicly provide access to, under Section 7, as following:

> ***"7. Declaration of public record.**- Subject to the provisions of section 8, the following record of all public bodies are hereby declared to be the public record, namely:-*

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[102]PLD 2012 Supreme Court 292. Watan Party v. Federation of Pakistan.
[103]2010 SCMR 1489. [Full citation]
[104]Defined in the said Ordinance as: *'2(i) "record" means record in any form, whether printed or in writing and includes any map, diagram, photography, film, microfilm, which is used for official purpose by the public body which holds the record ... '*

(a) policies and guidelines;
(b) transactions involving acquisition and disposal of property and expenditure undertaken by a public body in the performance of its duties;
(c) information regarding grant of licenses, allotments and other benefits and privileges and contracts and agreements made by a public body;
(d) final orders and decisions, including decisions relating to members of public; and
(e) any other record which may be notified by the Federal Government as public record 'for the purposes of this Ordinance…"

vii. Section 8 enlists very broad exceptions to Section 7, and excludes various kinds of documents, including:

"(a) noting on the files; (b) minutes of meetings; .... and (i) any other record which the Federal Government may, in public interest, exclude from the purview of this Ordinance."

viii. Government is not obligated under the Ordinance to provide reasons for exclusion of documents under sub-section (i) of Section 8, nor does it provide clear definition of what might constitute 'public interest'. Courts have provided exceptions to exclusionary rules. If a document impinges on rights of a person, then that document is outside the ambit of Section 8.[105]

ix. Similarly, documents relating to working of a public organization, funded by tax payers' money, are within the scope of Section 7. A case brought before Federal Tax Ombudsman challenged the Commissioner Inland Revenue's decision not 'to provide the requester/complainant information pertaining to specific aspects of the Federal Board of Revenue's working'. Court held that the

[105]In Humaira Hassan v. Federation of Pakistan. 2012 PLC(CS) 566, Court held that "[an] adverse order or decision against any officer … recorded in minutes of meetings of any public body did not exclude it from being a public record in terms of S.8(b) of Freedom of Information Ordinance, 2002. Any adverse order or decision against any officer or any member of public could retain its independent status as a public record under S.7 of Freedom of Information Ordinance, 2002, and it mattered less if the same had been incorporated or recorded as a part of any minutes of a meeting

'[p]urpose of the said Ordinance was to ensure transparency and promote good governance by making the Government more accountable and open and was meant to make Government more efficient and citizen friendly delivering public services. Access to information was a sine qua non for a constitutional democracy. Public had a right to know everything done by the Public Functionaries, subject to any restriction imposed by law.' Court went to hold that the 'the data/documents requested by the requester did not fall within any of the exemptions provided under Freedom of Information Ordinance, 2002', and noted the overriding effect of Article 19-A, holding that '[n]o exemption could be claimed on the basis of any other law---Provisions of the Freedom of Information Ordinance, 2002 also had overriding effect over the provisions of Income Tax Ordinance, 2001 as given in its S.3 (a non obstante provision)'.[106]

x. In order to weigh competing interests covered under Sections 7 & 8, Courts, after excluding 'routine business of public functionary' from the 'veil of secrecy of privilege', have stated that a 'balancing test' would be adopted based whether 'disclosure would cause greater harm than good'.[107] Court did not go into great detail what factors would inform while performing the balancing test.

Restrictions

i. These generalizations, however, do not inform us about restrictions to the right to access. Article 19-A subjects the right to access to conventional restrictions. Karachi High Court held Article 19-A to be applicable whenever "a particular information is of public importance [and that] absence of regulations and restrictions could not render such right as nugatory, but same would still be available to citizens."[108] Beyond that, jurisprudence has not resolved the thorny question of excessive restrictions put in place by existing anti-access legal regimes.

[106] In Waheed Shahzad Butt v. Chairman, Federal Board of Revenue. 2013 PTD 1293.
[107] Indus Battery Industries (Pvt.) Ltd. v. Federation of Pakistan. 2008 CLD 177 (Karachi)
[108] Muhammad Masood Butt v. S.M. Corporation (Pvt.) Ltd. 2011 CLD 496.

ii. There are many legal instruments which are incompatible with Article 19-A and principles of free access to information. Some of these instruments, which hinder free flow of information across mediums and have not been repealed or amended, are as following:

a. "Telecom Act, Telegraph Act, Post Office Act and PPC, were introduced much before the emergence of freedom of information law in 2002.

b. "The Pakistan Penal Code 1860 is a general criminal law, which defines crimes/offences and punishments thereof. However, the Code contains various provisions, which directly or indirectly affect free-flow of information. For example, Section 292 puts ban on sale, hiring or distribution of obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object. However, the Code does not define the term "obscene." Similarly, Section 501 of the Code terms printing or engraving of the matter, which can be defamatory, as a crime. Moreover, Section 502 bans sale of such allegedly defamatory matter.

c. "The Telegraph Act, 1885 - Section 24 – states that unlawful learning of contents of any message is an offence, which is punishable with the imprisonment. Furthermore, transmission of false and fabricated or indecent or obscene message, is an offence and punishable with imprisonment and fine.

d. The Post Office Act, 1898 prohibits transmission by post of any indecent or obscene (a) printing, painting, photograph, lithograph, engraving, book or card or (b) any postal article having any words, marks or designs of an indecent, obscene, seditious, scurrilous… [etc.]"[109]

e. Rules of Business, Government of Pakistan (Rule relating to official, confidential and classified documents)

f. The Official Secrets Act, 1923

Broadcasting

i. The Pakistan Telecommunication (Re-organization) Act, 1996 legislates against speech under Section 31, 'Offences and penalties'

[109]Muhammad Aftab Alam, 'Right to Information and Media Laws in Pakistan,' Centre for Peace and Development Initiatives (CPDI).

extending to whoever, "unauthorisedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, indecent or obscene," or "commits mischief".

ii. False speech is not generally prohibited in democracies. However, it is different from broadcasters who as entities using the public airwaves are subjected to higher standards. Even journalists commenting on public issues or officials do not enjoy much flexibility or protection under law. However, international law does give leeway to journalists as long as they properly investigate and do not show actual malice in producing false news, thereby not making reporting of false information a strict liability.[110]

iii. Indecent and obscene speech is one of the most controversial and difficult kinds of speech to be regulated. Many jurisdictions and courts have recognized obscenity and indecency to be an exception to free speech, but only in cases of extreme expressions beyond acceptable community standards. Developed jurisdictions tend to regulate indecent or obscene speech by filtering information, by restricting it from specific forums or platforms rather than banning the content altogether, unless it is not too explicit. In Amjad Ali v. State, the Federal Shariat Court held that playing video or showing photographs of women stripped off her clothes, or any element of sexual content would constitute an act of obscenity.[111]

iv. The PEMRA Ordinance 2002 states that all media broadcast licensees will, "ensure that all programs and advertisements do not contain or encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or other material offensive to commonly accepted standards of decency." Violation of these terms can include fines and imprisonment.

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[110]This is the position under US law. Other jurisdictions such as Germany and France, do not require 'actual malice'. See Pech, Laurent, Balancing Freedom of the Press with Competing Rights and Interests: A Comparative Perspective. FREEDOM OF EXPRESSION, Eoin O'Dell, ed., Ashgate, Forthcoming.

[111]PLD 2013 Federal Shariat Court 42

v. Our research of case law shows that Courts need to consider following factors, which are recognized internationally, before criminalizing hate speech:

a. Severity of hatred: the nature of harm advocated, magnitude, intensity in terms of frequency, extent and reach of the message, and use of the medium.
b. Intent of the speaker in inciting hatred, violence or discrimination.
c. Size of the audience.
d. Artistic expression should be considered, as an exception.
e. Probability and likelihood of occurrence of harm.
f. Content and form of the speech; directness, magnitude of the message
g. Background of the speaker.
h. Imminence of threat and act of violence.
i. Context of the speaker, audience, intended act of harm, etc.

Article 204: Contempt of Court

"A Court shall have power to punish any person who:

a. Abuses, interferes with or obstructs the process of the Court in any way ordisobeys the order of the Court;
b. Scandalizes the Court or otherwise does anything which tends to bring the Court or a judge of the Court into hatred, ridicule or contempt;
c. Does anything which tends to prejudice the determination of a matter pending before the Court; or
d. Does any other thing which, by law, constitutes contempt of the Court..."

i. The ambit of Article 204 is limited to High Courts and the Supreme Court. The Article does not provide a comprehensive definition of 'contempt', however, it lays down the actus rea, i.e. physical act of crime, of contempt of court. Academics have classified contempt of courts into three different categories: scandalising the court, abusing the parties before the court and prejudicially affecting the conduct of the court. The protection against the abuse of the process of court competes against the right to free speech, and restricts the latter constitutional right. The ambit of the constitutional guarantees against contempt of court has led to

impeachment of a sitting Prime Minister, head of the national parliament in recent constitutional practice of court, outweighing rights and privileges internationally recognized for political process in favour of respect for Court.

ii. Courts have long been emphatic about protection against any prejudicial remark or activity against the court. In Ch. Zahur Ilahi versus Mr. Zulfikar Ali Bhutto,[112] the Court warned sitting Prime Minister that if his speeches prejudiced sub judice matters and contained any implied threats to the Court, it would not be protected under Article 248 and contempt of court proceedings would be initiated against the Prime Minister. The judgment significantly curtailed parliamentary privilege and removed the protection parliamentarians usually enjoy in more developed democracies against critical comments on judicial matters.[113]

iii. Supreme Court in Contempt Proceedings against Imran Khan, Chairman, Pakistan Tehreek-I-Insaf,[114] held a chairman of a political party for calling conduct of judiciary "shameful," even though the comment did not concern a pending judicial matter. The Court found the comment to be prima facie in contempt of court. However, the politician 'attributed it to a misunderstanding' and that he was merely complaining about administrative conduct of returning officer nominated by subordinate judiciary. The Court held that 'no reason existed to doubt the bona fide of the alleged contemnor or to disbelieve his statement about judiciary'. Generally, Courts have held such remarks against judges to be derogatory and beyond Article 19, and have punished speakers,[115] even though such comments may not affect administration of justice in a pending case.

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[112]Citation: PLD 1975 SC 383.
[113]For instance, in United Kingdom, Article IX of the Bill of Rights states: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or question in any Court or Place out of Parlyament." House of Lords Constitution Committeee, *Parliamentary Standards Bill: Implications for Parliament and the Court,* 18th Report, Session 2008-09, HL 135. See also. A. Le Sueur, et. al. *Public Law: Text, Cases, and Materials,* 2ndedn (2013, London: Oxford), p. 132-133.
[114]PLD 2014 Supreme Court 367
[115]2013 SCMR 170.

Recommendations

Problem:2a. Freedom of expression (FOE), as defined in Article 19 of the Constitution, is restrictive and falls short of international FOE standards.

Solution: 2a. Article 19 should be revisited with a view to narrowing restrictions and reflecting official commitments made by the State of Pakistan, including in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Stakeholders:2a. Federal government, parliament, political parties, civil society, representative associations of media owners and workers, and media support groups

Problem:2b. Contempt provisions as defined in Article 204 of the Constitution restrict free speech and fair comment.

Solution: 2b. Constitutional provisions governing contempt and contempt of court laws should be reviewed so as to limit discretion in favour of free speech.

Stakeholders:2b. Federal government, parliament, political parties, civil society, representative associations of media owners and workers, and media support groups

Problem: 2c. Laws and provisions discouraging free speech impair pluralism.

Solution: 2c. Undue restrictions in the legal framework for free speech should be removed and provisions relating to pluralism and freedom of expression in the Constitution should be proactively enforced.

Stakeholders:2c. Federal government, representative associations of media workers and media owners, civil society organisations, lawyers and media support groups.

CHAPTER 3

JOURNALISTS' RIGHTS

JOURNALISTS' RIGHTS

Employment, working rules, jobs, safety regulations, source protection, rules and systems of accreditation

Introduction

i. Exercising one's fundamental human right to free speech in Pakistan, whether professionally or privately, has traditionally been difficult, especially on issues related to religion and military's role in politics. Although press laws may not be as draconian and journalists may not be as routinely imprisoned or censored as they used to be by the state in the 1980s and earlier, the threats to the profession have gone from bad to worse, especially in the new millennium. The service regulations working laws governing journalism and its practitioners are considered non-facilitative. The threats journalists face every day – whether working for a newspaper or a broadcaster – can vary from the mild to the harsh. This pattern stands out in sharp relief in the post-9/11 world that has seen a well-documented rise in the levels of violence, extremism and terrorism in Pakistan. The number of threat actors targeting media practitioners has increased ranging from the state to non-state actors and even religious groups and political parties. The community itself has done little to effectively self-regulate, educate and establish mechanisms that can blunt these threats. In general media houses don't have safety policies or protocols, mandatory and regular training and safety equipment to report from violent regions, or any satisfactory internal service and compensation schemes. The press councils tasked with protecting journalists against state oppression are dysfunctional.

ii. The degree of impunity towards crimes against free speech and journalists is rising. Over 100 journalists and media workers have been killed between 2000 and 2015, and killers of only three journalists have been identified, trialed and punished, according to

Pakistani media watchdog Freedom Network. State agencies have been routinely suspected for targeting, harassing and in some cases murdering dissident voices, whether of professional journalists or civil society. The government has not taken effective steps to tackle challenges to the freedom of expression including threats to journalists covering or blogging on sensitive issues. The government has failed to end the culture of impunity. As a result, killings targeting expression have increased and threaten civil society actors who express diverging political or ideological views. These killings create an environment where journalists, bloggers and human rights defenders fear the consequences of free speech. This has seriously undermined their ability to document violations and advocate for human rights.

Employment, Service, Working Rules

i. Working rules of journalists in Pakistan are governed by the following statutory instruments:

- Newspaper Employees (Conditions of Services) Act, 1973[116] (henceforth referred to as 'NECOSA')[117]
- Implementation Tribunal Newspaper Employees (Procedure and Functions) Rules 1997 (henceforth referred to as 'ITNE')

ii. The two statutes work hand-in-hand. NECOSA makes it mandatory on government to formulate a 'wage award' which fixes rates of salaries or wages for newspaper employees, both journalists and non-journalists.[118] A wage board has to be constituted under the law, composing of owners and employees of newspaper establishments,[119] with equal representation[120] and an

[116]The said Act amended and re-enacted *Working Journalists (Conditions of Services) Ordinance, 1960.*

[117]Akin to this statute, in India there is Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

[118]Section 2(j) of the Act defines it as: '(d) "newspaper employee" means any person employed to do any work in, or in relation to, any newspaper establishment and includes— (i) a whole-lime journalist, including an editor, a leader writer, news editor, feature writer, reporter, correspondent, copy tester, cartoonist, news photographer, calligraphist and proof-reader ; and (j) a whole-time non-journalist, including a manager, clerk, stenotypist, printing engineer, linotype operator, composer, type-seller, photo studio attendant, printing worker, an accountant and an office peon …'

[119]Defined under the Act as: Section 2(e): '"newspaper establishment" means an establishment under the control of any person or body of persons, whether incorporated or not, for the production, printing or publication of one or more newspapers or for conducting; any news agency or syndicate…'

[120]Web Desk, 'Implementation Tribunal for Newspapers Employees (ITNE) chief for newspaper industry problems resolution,' Pakistan Press Foundation. Url: <www.pakistanpressfoundation.org/2002/02/implementation-tribunal-for-newspapers-employees-itne-chief-for-newspaper-industry-problems-resolution/> (Last accessed on 07-04-2016)

award has to be given after every five (5) years. The statute also gives broad, guiding factors for determining wages of employees.

iii. The statute requires newspaper establishments to furnish their terms and conditions of service to the employees, under Section 3. Many of the industries in Pakistan still remain informal and the contract of employment is often not put into writing. In litigation, as it happens in lot of commercial and contractual transactions, this goes to the disadvantage of both parties.

iv. Employees under the Act are also protected against arbitrary termination of service without a show cause notice, under Section 4,[121] of period ranging from one to three months, depending upon the term of employment. The law also requires, like other regulated industries, setting up a provident fund. The working hours per week are capped at 'forty-two hours in a week, exclusive of the time for meals'[122] with 'fifteen days' casual leave of absence with wages in a calendar year'. The wage rates are minimum levels of compensation to be paid out to employees.

v. The Federal Government is vested, under Section 9, with the authority of constituting 'a Wage Board for fixing rates of wages in respect of newspaper employees', for 'time-work and piece-work'. The board consists of a High Court Judge, members appointed by Federal Government and equal representation from newspaper employees and employers of newspaper establishments. Section 10 stipulates factors in arriving at wage rates:

> *"In fixing rates of wages in respect of newspaper employees, the Board may take into consideration the cost of living, the prevalent rates of wages of comparable employments, the circumstances relating to the newspaper industry in different regions of the country, and any other circumstances, which to the Board may seem relevant."*

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[121] The Lahore High Court has also ruled that for all employments, no termination can take place without serving notice.

[122] A week is defined as 'a period of seven days beginning at midnight on Saturday'.

vi. Implementation Tribunal Newspaper Employees implements the wage award and adjudicates disputes between the state, employers and employees. Labour tribunals can also exercise jurisdiction under the statute on direction of the ITNE.

Constitutionality of the Wage Board

i. In 2012, a case[123] came before Karachi High Court against the constitutionality of award of wage by 7th Wage Board by the Chairman of the Board and not by all of its members. The Court first ruled on the constitutionality of the governing act, i.e. NECOSA, and then went to rule upon the award itself, as following:

> *"Newspaper Employees (Conditions of Service) Act, 1973 was intra vices of the Constitution and not violative of owners of newspaper's fundamental rights guaranteed thereunder. Board headed by Chairman consisted of equal number of members representing owners of newspapers and newspaper employees. Role of such members was merely to facilitate and advise Chairman as they were neither arbiter nor adjudicator. Chairman, after considering advise and opinion of such members and applying his judicious mind thereto could render such award as an independent arbiter ... Impugned award was neither coram non judice nor void ab initio."*

ii. In the opinion of the Court, 'powers of Chairman could not be said unbridled or arbitrary' under the Act as he was required to apply 'his independent mind to advices solicited from equal number of advisors belonging to newspapers establishments/ owners and newspaper employees'.

iii. Supreme Court, in the same year, clarified the judicial nature of the Wage Board and its constitutionality.[124] The Court held the

[123] All Pakistan Newspaper Society (APNS) vs. Federation of Pakistan through Secretary Information and Media Development. (PLC 2012 Karachi 128).
[124] All Pakistan Newspaper Society (APNS) vs. Federation of Pakistan. (PLD 2012 Supreme Court 1).

NECOSA act to be part of greater scheme of 'access to justice to all' in Pakistan, and determined the Wage Board did not deny access to justice. Court did not provide in-depth guidance into the meaning of 'access to justice' and how it might have been denied. Rather it emphasized the conformity of the NECOSA and the board to the broad structural and procedural law. It held:

> *"Wage Board does not perform judicial or quasi judicial function, rather performs only a delegated executive function of the legislature, be it Federal or the Provincial of fixing the wages of newspaper employees ... Contention was that legislature had completely abdicated its powers, as it had made excessive delegation of powers to the Wage Board without any guidelines. Petitioners had not pointed out during the proceedings or thereafter as to how Chairman of the Board had exceeded his authority/jurisdiction, which was conferred upon the Board in terms of S.10 of the Act. Contention of the petitioner was repelled, having not been made with reference to any particular item in the award."*

iv. A bizarre criticism against the Wage Board was that no appeal lie against the wage award given by the board, and that it violated Article 10-A of the Constitution of Pakistan, 1973 which guarantees fair trial and due process of law. Court held that Article 10-A did not apply to the situation as question of due process arises where 'there was any dispute between two parties in an adversarial litigation against each other, which required to be decided by the Board, and as to whether the claim of entitlement of one of the parties was against the State or any State agency, which required determination by the Board or the Board was performing a legislative act where there was no existing right or dispute to be decided between the parties'.[125]

[125] Ibid.

Enforcement of Substantive Rights

i. Enforcing strict rules against illegal termination, in Nafees-ud-Din vs. Kanwar Shaukat Naz[126], a workman in a newspaper establishment, 'with continuous service of more than 3 months', was 'ousted from service without written order and without one month's notice or notice pay'. Court held the termination to be illegal and re-instatement with back benefits.

ii. In another judgment[127] against arbitrary termination of a newspaper employee 'on ground of re-organization of employer' and that 'it was difficult for Management to have confidence in respondent'. Karachi High Court ruled against freedom of management to fire an employee. Plea of management that the employee was not acquainted with new equipment was not enough to persuade the court, and hence upheld lower court's decision, as following:

> *"Alleged re-organization of establishment was not visible anywhere; in fact said single termination of respondent was the entire re-organization of appellant. Re-organization was not a knee jerk reaction; it had to be fully justified and then its process was to be carried essentially under just and fair scheme, which had not been done in the case. Argument that respondent was not acquainted with new equipment, would not carry any weight; it was not only invalid in circumstances, but was an afterthought too. Nothing about that was mentioned in notice of termination. Termination of respondent being malicious and outrageous, order passed by Labour Court declaring termination as malicious, would not call for interference in appeal."*

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[126]PLC 1983 Labour Appellate Tribunal Punjab 296.
[127]Messrs Emmay Zed Publications (Pvt.) Ltd., through Secretary vs. Abdul Rahman Baloch. (PLC 2005 Karachi High Court 344.)

iii. At another instance, Court ruled upon what 'good cause' might be for firing an employee. In Pakistan Herald Publication (Pvt.) Ltd. vs. Najeeb Ahmed,[128] Court held:

> *"In matter, without giving a notice of show cause as to why employment of employee; should not be terminated as his work was below the standard or not up to the mark, could only be said to be a subjective determination without giving employee an opportunity for furnishing of explanation whatsoever."*

iv. The Chairman of Wage Board recommended that the "the newspapers should be categorised in accordance with circulation and the advertisements should be 'money wise' so that none of the newspapers is treated step-motherly."[129]

v. The service and working (i.e. human resource) rules of media outlets are not regulated bylaw. Since media houses are private bodies, it makes great economic and legal sense to let the industry make its own hiring, firing, human resource, compensation and promotion rules. The very nature of a private contract is power-conferring; hence excessive government intervention is ill-advised. However, this does not bar government from introducing generally applicable 'negative' obligations on employers not to discriminate, treat unfairly, and to provide safety, financial incentives, etc.

Labour Laws: Employment

i. There is no general employment law regulating managerial, supervisory or executive staff of the companies, nor is there equal opportunity or anti-discriminatory law. Labour law only gives protection to 'workmen' who do not exercise any supervisory, managerial, or executive tasks.

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[128]PLC 2000 Labour Appellate Tribunal Sindh 585.

[129]Web Desk, Implementation Tribunal for Newspapers Employees (ITNE) chief for newspaper industry problems resolution. Pakistan Press Freedom. Url: <www.pakistanpressfoundation.org/2002/02/implementation-tribunal-for-newspapers-employees-itne-chief-for-newspaper-industry-problems-resolution/> (Last accessed on 09-04-2016.)

ii. Industrial and Commercial Employment (Standing Orders) Ordinance 1968, established relationship of employer and employee and made mandatory issuance of the contract of employment to the employee by means of a formal employment letter.[130] It is applicable to all industrial and commercial establishments with 20 or more workers. Previously, labour contracts were generally unwritten and could only be enforced through the courts on the basis of oral evidence, or previous practice.

Restraint of Trade: Outage of Channels

i. Outage [blocking broadcasts or operations] of TV channels on pressure of political actors, state and non-state rogue elements is not uncommon since independent TV channels were allowed in Pakistan in 2002. Without recourse in law, this amounts to a severe violation of many constitutional rights of media owners and journalists, as their right to speech is curbed, as also of media consumers whose access to information is restricted. The Pakistan Broadcasting Association, the representative association of independent TV channels in the country, proposed a common strategy for all media houses, which are its members,[131] to move against perpetrators of forced outages, i.e. 'Channel Closure Standard Operating Procedure (SOP)'. The SOP is designed to collectively respond to unlawful and forceful outage of channels by 'external entities' by mainly revealing the identity of the entities. The SOP has not been implemented, which shows disunity among the media houses.

Accreditation or Licensing

i. It is widely recommended that there should be no licensing requirements for journalists, as it amounts to a clog or restriction on one's right to free speech. However, formal registration or accreditation of journalists for better access to certain events, such

[130]It included, "The obligatory contents of each labour contract, if written, are confined to the main terms and conditions of employment, namely nature and tenure of appointment, pay allowances and other fringe benefits admissible, terms and conditions of appointment."

[131]Pakistan Broadcasters Association, Channel Closure Standard Operating Procedure, Url: <http://pba.org.pk/pdf/media_protection_policy.pdf> (Last accessed on 09-04-2016.)

as parliamentary proceedings, criminal records, crime scenes, etc., optimizes the output of speech to the public.

ii. There is no law in Pakistan that requires a journalist to obtain a license to operate. There are no special laws for obtaining accreditation. Journalists who are affiliated with media organizations are given accreditation, without any charge, which gives them privileged access and facilitation from government departments, except in Sindh, where 'working journalists and media persons in the province will for the first time pay a fee for getting accreditation from Sindh government's information department, otherwise considered a basic right…'[132] The criteria for giving accreditation is nowhere put in writing, and is in sole discretion of government departments.[133]

iii. The law – statute or case-based – does not give definition of 'journalist', as such. Nor are there any other barriers to entry into the profession. Pakistan Federation Union of Journalists (PFUJ) in its application form for membership only requires information about years of service as a journalist.[134] Other optional questions inquire about association with a media organization, ownership of media outlets, etc.[135]

iv. Pakistan Broadcasting Association gives membership to established satellite TV and FM radio[136] organizations; and, advertising and media agencies.[137] It does not extend membership or accreditation to freelancer broadcasters.

v. Council for Pakistan Newspaper Editors (henceforth referred to as 'CPNE') is an independent organization of newspaper editors. The

[132]Web Desk, Journalists accreditation to cost Rs500, Pakistan Press Foundation. Url: <www.pakistanpressfoundation.org/2015/01/journalists-accreditation-cost-rs500/> (Last accessed on 07-04-2016.)
[133]Ministry of Information and Broadcasting has no publicly available rules or regulations regarding accreditation.
[134]The precise question is: 'How long in Journalism' PFUJ, Application form for Membership. Url: <http://pfuj.pk/pdf/PFUJ%20Membership%20Form.pdf> (Last accessed on 06-04-2016.)
[135]The organization does not provide any publicly available definition of 'journalist'. The rules of the organization does not define the term either, available at <http://pfuj.pk/aims/>.
[136]Application form available at < http://pba.org.pk/pdf/ApplicationForm.pdf>.
[137]Application form, available at <http://pba.org.pk/pdf/AccreditationForm.pdf>, requires complete information about registered office, partners/directors, and detailed activities of the agency.

requirement to become its member is that the applicant must be an editor in a 'publication for at least 06 months in case of a daily publication' and 'for at least 12 months in case of a periodical publication'.[138]

vi. It is not clear whether these organizations would open membership for online bloggers, publishers or editors. PFUJ recognizes that blogging and online platforms' free speech rights are under constant threat and censorship from government.[139]

Safety and Protection for Journalists

i. Threats and violence against journalists are recognized to be threats on the principle of free expression. It can lead to compromised reporting as it forces threatened journalists to leave conflict zones or even the profession itself and often resort to self-censorship. As a consequence, as can be seen in the case of the state's crackdown against militancy and terrorism in the tribal areas (FATA) in Pakistan, that news reports from conflict areas are often based on press releases rather than regular free reporting by independent journalists. This jeopardizes the essential ingredient for well-functioning democracy: informed citizens.

ii. According to a research by Pakistan Press Foundation (henceforth referred "PPF"), from 2001 to 2015, more than 115 journalists and media workers have been killed in the line of their journalistic duties.[140] 47 of these have been reportedly murdered precisely for their professional activities. Many journalists who work in various diverse parts of the country pursue highly dangerous assignments, with little or no formal training, protection and guidelines by their own media houses or by government.[141]

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[138]Council of Pakistan Newspapers Editors, Application for Membership. Url: <http://cpne.com.pk/wp-content/uploads/2015/12/CPNE-New-Membership-Form.pdf> (Last accessed on 05-04-2016.)
[139]Web Desk, Pakistan Press Foundation expresses concern on blogging platform Medium's blocking. 12-02-2016. PPF. Url: <http://www.pakistanpressfoundation.org/2016/02/pakistan-press-foundation-expresses-concern-on-blogging-platform-mediums-blocking/> (Last accessed on 11-04-2016.)
[140]Muhammad Awais, 115 killings make Pakistan fourth deadly country for journalists, News World Plus. Url: <www.newsworldplus.com/115-killings-make-pakistan-fourth-deadly-country-for-journalists.html> (Last accessed on 10-04-2016.)
[141]PFF report on violence against media, p. 5, details at least 30 reported incidents of violence, murder, kidnapping, detaining, criminal litigation and manhandling against media personnel. Report available at: < http://www.pakistanpressfoundation.org/wp-content/uploads/2016/01/PPF-Report-New.pdf>.

iii. Industry observers, local and foreign, have shown disappointment and dissatisfaction with protection and infrastructure provided by government to journalists. In fact, journalists have been under immense pressure from army, government agencies and out-of-control non-state actors to self-censor their speech, in gross violation of clear provisions of constitutions. It is widely reported that journalists and media organizations receive indirect threats by state institutions.[142] A culture of impunity is demonstrably rampant and government authorities have failed to curb it. Such a violent environment creates a chilling effect for free speech and serves as a powerful deterrent for bloggers, journalists, human rights activities and civil society to express themselves freely.

iv. If journalists do not feel safe and secure, 'they cannot be expected to carry out their professional duties that enable the media to provide the public platform for the exchange of ideas, opinions and information. Unpunished killings and violence lead to self-censorship – journalists come to believe that it is simply too dangerous to cover certain topics. The high visibility of journalists means that members of society at large do not feel that they themselves are safe to speak when they see a journalist is attacked, and especially when there is impunity for the attackers'.[143]

v. Without providing safety for journalists, free speech rights are endangered, and it poses a threat to democratic norms. UN Special Rapporteur for Freedom of Expression in his 2012 report stated:

> *"Journalists are individuals who observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole."*

[142]Jon Boone, Pakistan press freedom under pressure from army. 14-09-2015. The Guardian. Url: <http://www.theguardian.com/world/2015/sep/14/pakistan-press-freedom-army-journalists-military> (Last accessed on 11-04-2016.)

[143]UNESCO. Journalists' Safety Indicators: National Level: ased on the UNESCO's Media Development Indicators. 04-11-2013. Url: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/Final_Journalists_Safety_Indicators_National_Level.pdf> (Last accessed on 11-04-2016.)

Nature of Crimes against Journalists

i. Pakistan has been selected as one of five pilot countries of the world for implementation of a UN Plan of Action on Impunity Against Journalists and Issues of Safety because the country is considered as one of the most dangerous countries of the world to practice journalism. According to Freedom Network, at least 106 journalists and media workers have been killed between January 2000 and April 2016 at an average of one every five weeks – the worst average for any country of the world for this period.

ii. UNESCO in its 2013 report,[144] set out the key standards which should apply in a country like Pakistan, which if absent might represent a violation of the fundamental rights of journalists:

- 'Journalists and associated media personnel are not subject to threats, harassment or surveillance
- Journalists and associated media personnel are not physically attacked, unlawfully detained or killed as a result of pursuing their legitimate activities
- Media organisations are not forced to close down as a result of pursuing their legitimate activities, or threatened with closure
- Crimes against journalists are prosecuted and there is no climate of impunity
- Media organisations have policies for protecting the health and safety of their staff and freelancers
- Measures of social protection are available to all staff, including temporary and freelance employees
- Journalists do not routinely self-censor because of fear of punishment, harassment or attack
- Confidentiality of sources is protected in law and respected in practice.'

iii. UNESCO also defined 'key indicators of safety and impunity' which include number and types of threats against the lives and limbs of journalists, actual attacks, killings of journalists, other threats and vandalizing against media institutions.[145] Pakistan

[144]Ibid. P. 5-6.
[145]Ibid. P. 8.

Impunity Watch has listed over 400 cases of such instances against media personnel and organizations, including freelancers, in Pakistan.[146]

iv. An action plan for governments suggested by UNESCO includes following measures, which if followed would bring Pakistan within the list of countries with greatest protections for journalists and their organizations:

a. 'The State's laws do not include sweeping or arbitrary provisions on treason, terrorism, state security or insult/ defamation offences etc. that are susceptible to misuse for the purpose of intimidating or prosecuting journalists.
b. The State's laws and policies on safety of journalists cover online as well as offline, and do not exclude community media or citizen journalists.
c. Attacks on journalists (including community media and citizen journalists) are recognized by the State as a breach of human rights law and the criminal law, and in the case of armed conflicts, humanitarian law.
d. Where appropriate, there is legislation that sets out special/higher penalties for crimes against freedom of expression and/or crimes against journalists.
e. The State recognises that protections applying to journalists may also be required to protect persons who represent sources of information for journalists and human rights defenders.
f. The State has measures to support and compensate families of murdered journalists.
g. In cases of electronic surveillance, the State respects, and ensures respect for, freedom of expression and privacy, through international standards of transparency, proportionality and legitimate purpose.
h. The State reports on attacks to the appropriate UN agencies, including responses to the UNESCO Director-General's requests for information on judicial follow-up to any killing/s of journalists.'

[146]Pakistan Impunity Watch. Cast List. Url: <http://pakistanimpunitywatch.org/case-list/> (Last accessed on 01-10-2016.) For geographical distribution of the events on an interactive map, see <http://pakistanimpunitywatch.org/map/>.

v. Currently, such protections are almost non-existent in Pakistan. In 2011, a bill, entitled *Journalist Protection and Welfare Bill,* was introduced to provide safety net and protection for journalists. By May 2016, the bill is still pending confirmation at Senate. The bill proposes easy loans, establishment of journalists' social security fund, easy access to public places including high-security areas, free medical treatments, etc. The bill provides a very broad definition of journalist, under Section 2(e), as someone "including both male and female, as anyone who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, analyzes or publishes news or information that concerns local, national or international events or other matters of public interest…"

Contributions of Media Organization for Safety of Journalists

i. Some media organizations have produced similar types of safety measures and protocols. There exist an indifference towards institutional response for providing sophisticated training and systems to protect journalists. International media organizations in Pakistan such as BBC, AFP, Reuters, etc., comply with the kind of measures proposed by UN.

1. Proposal of Pakistan Press Foundation (PPF)

PPF has produced security hand-outs for media workers for physical and digital safety.[147] In a comprehensive report detailing crimes against journalists in Pakistan, PPF proposed broad, important but at times expansive obligations on the government to ensure security of journalists. Some of the recommendations are as following:

a. "Criminal cases should not only be registered but should also be properly investigated and prosecuted against the perpetrators of violence against media.

   This is an important imperative for the state to act upon to end impunity towards violence against journalists.

[147]Including, First Aid Handouts; Trauma Handouts; Security Handouts: <http://www.pakistanpressfoundation.org/physical-security-2/>; Digital security handouts: <http://www.pakistanpressfoundation.org/digital-security-3/>.

b. "A special prosecutor on violence against media should be established at federal and provincial level to investigate cases of violence against media."

   This would require the government to allocate a lot of state resources to this issue, so that a dedicated monitoring cell may be more feasible.

c. "Journalists should be provided with safety and first aid trainings and guidance on how to report in hostile environment. Journalists working in conflict areas should also be provided with guidance in recognizing and dealing with stress and post-traumatic stress."

   Given Pakistan's security situations, it is reasonable for government to allocate resources for training of journalists, who are consistently being targeted by terror groups. It is vital for government as journalists provide critical information from conflict zones, necessary for citizens to make informed decisions about war efforts.

d. "Safety equipment including bulletproof jackets and medical kits should be given to journalists covering the conflicts."

   Providing such high levels of security would place quite a burden on government. As an alternative, it could make it legally binding on the organizations to provide for such measures, and pass relevant legislations.

e. "Employers should provide journalists life and medical insurance and also compensation in case of death or injury related to their work."

   Life and medical insurance can be made mandatory on the media organizations. A claim for Government compensation can only lie if government is found grossly negligent in a tort claim; hence a claim for constitutional tort should be upheld.[148]

[148]Constitutional torts in American jurisdictions have successfully been claimed for long. See, J. J. Park, The Constitutional Tort Action as Individual Remedy. Url: <http://www.law.harvard.edu/students/orgs/crcl/vol38_2/park.pdf> (Last accessed on 29-03-2016.) Similarly, in United Kingdom, tort against 'public bodies' are also actionable.

f. "There is need to for media organisations to develop "operating procedures" with law enforcement agencies that will allow journalists to cover the conflict situations with greater safety."

This is certainly a compelling government interest for it to legislate to require the organizations to provide for such procedures.

2. Press Council of Pakistan (PCP)

i. Press Council of Pakistan was supposed to provide legal cover to victimized and harassed journalists. Section 8 of the PCP Ordinance states:

> **"8. Functions of the Council.** (2) The Council shall also act as a shield to freedom of the press. It may receive a complaint by a newspaper, a journalist or any institution or individual concerned with a newspaper against Federal Government, Provincial Government or any organization including political parties for interference in the free functioning of the press."

ii. Not a single complaint, as per publicly available record, has been heard and disposed of by the Council.

Source Protection

i. Evidence law requires citizens to produce evidence and bring forth testimonies. The competing interest is the right of journalist to protect his source's confidentiality, just like a legal advisor is bound by attorney-client privilege. Should the journalists be compelled to reveal the identity of their source, or should the privilege be maintained? Currently, there is no operative law in Pakistan that provides clear guidelines to that end. Nor has ever been there a law commission or government sponsored consultation effort to create law on source and whistleblower protection, in line with global jurisprudential trends. Hence, there are no whistle blower protection law at national level in Pakistan.

ii. There have been instances when judicial forums have protected the right to journalist's not to reveal their sources. For instance, it was reported that 'during a hearing of the inquiry commission probing allegations of rigging in the 2013 general elections, renowned

lawyer Abdul Hafiz Pirzada had been stopped by the judges from pressing a senior journalist for disclosing the source of information of one of his reports'.[149]

iii. In 2011, a bill, entitled Journalist Protection and Welfare Bill,[150] was introduced to find a middle ground to the competing principles of source protection and administration of justice. By May 2016, the bill was still pending for debate before the Senate committee.[151] The main clause relating to source protection is as following:

> ***"Section 3. Protection of journalists from disclosure of information source.-*** *Journalists shall not be compelled to disclose their source and, if circumstances occur and matters of national security importance are involved where disclosure of source is demanded, the Supreme Court of Pakistan has the right to ask about the source but it would not make it public."*

Statutes

There are few statutes, which deal with source protection. None of the statutes grant privilege to journalists.

Anti-Terrorism Act, 1997

i. Section 11-L of the Anti-Terrorism Act, 1997 deals with disclosure of information in terrorism related cases.

> ***"11L. Disclosure of Information. ---*** *(1) where a person: --*
> *(a) believes or suspects that another person has committed an offence under this Act; and*
> *(b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment, he commits an*

[149] Amir Wasim, Senate panel to take up bill on journalists' safety. 13-12-2015. Dawn. Url: <http://www.dawn.com/news/1226091> (Last accessed on 12-03-2016.)
[150] Accessible at Url: <http://www.senate.gov.pk/uploads/documents/1326264326_477.pdf>
[151] The last meeting on 1st March, 2016 was postponed due to absence of media owners. Nuzhat Nazar, Journalists Protection, Welfare Bill Committee proceedings postponed. Pakistan Pres Foundation. Url: <www.pakistanpressfoundation.org/2016/03/journalists-protection-welfare-bill-committee-proceedings-postponed/> (Last accessed on 09-04-2016)

offence if he does not disclose to a police officer as soon as is reasonably practicable his belief or suspicion, and the information on which it is based.
(2) It is a defence for a person charged with an offence under sub-section (1) of this section to prove that he had a reasonable excuse for not making the disclosure:

Provided that this sub-section does not require disclosure by a professional legal advisor of any information which he obtains in privileged circumstances."

ii. The Act discriminates against journalists and does not provide in any proviso defense to journalists.

Investigation for Fair Trial Act-2013

i. Investigation for Fair Trial Act, 2013 vaguely refers to possibility of source for journalists. There is no judicial intervention in favour of journalists, either.

"Section 33. Confidentiality of proceedings.-- *The Judge shall ensure that during any proceedings under this Act, no disclosure of any source or information or proceedings is made that may compromise the future capability of the applicant's intelligence gathering in any manner whatsoever."*

Industry Regulations

i. No provision calling for source or whistleblower protection for the journalists has been made part of codes or charters of major media organizations.[152] However, there is provision requiring journalists to maintain confidentiality in PFUJ's rules, which puts the responsibility on media personnel:

[152]PFUJ, Code of Conduct, Url: <pfuj.pk/code-2/> (Last accessed on 10-04-2016)

> "11. A journalist should fully realize his personal responsibility for everything he sends to his paper or agency. He should keep Union and professional secrets and respect all necessary confidences regarding sources and information and private documents. He should not falsify information or documents, or distort of misrepresent facts."

Recommendations

Problem: 3a. Specific labour law regime relating to working journalists [Newspaper Employees Condition of Service Act, (NICOSA) 1973] is restricted to the print media and is outdated.

Solution: 3a. Relevant federal and provincial labour and related laws should be reviewed by a law reforms commission and amended to: (i) bring them into line with modern standards on employment, compensation and human resource development, including standard contracts and in-house professionalism trainings; (ii) embrace the post-18th Amendment devolution framework (both federal and provincial legislation); and (iii) extend them to print, electronic and online media.
Stakeholders: 3a. Federal and provincial governments, representative associations of media owners and media workers, lawyers and media support groups

Problem: 3b. There are no clear legal rules regarding protection of sources at national level.

Solution: 3b. The law of evidence should be reviewed and provisions on source protection for journalists should be introduced into this body of law in line with international law and best practices.
Stakeholders: 3b. Federal government, representative associations of media workers, media owners, judiciary, lawyers and media support groups

Problem: 3c. There is no legal protection for whistleblowers.

Solution: 3c. A whistleblower protection law should be adopted which provides protection against sanction for those who expose wrongdoing.

Stakeholders: 3c. Federal government, representative associations of media workers and media owners, civil society organisations, lawyers and media support groups

Problem: 3d. There are high levels of impunity in cases of attacks or threats of attacks against journalists and no special legal measures or frameworks to address this.

Solution: 3d. Special rules should be put in place – of both a legal and policy nature – which provide for the establishment of special prosecutorial offices in Islamabad and the four provincial capitals to investigate cases of attacks against journalists and media houses, to institute legal cases against those responsible and to expedite prosecution. These offices should benefit from guaranteed adequate annual budgets for the prosecutors.

Stakeholders: 3d. Federal and provincial governments, national and provincial legislatures, political parties, representative associations of media workers and owners, UN, media support groups and civil society

Problem: 3e. Media houses have generally failed to put in place adequate systems for protecting media workers against attacks and threats of attacks, especially for those reporting from conflict areas and who are otherwise subject to pressure and coercion. This includes: (i) inadequate training and access to equipment; (ii) poor information sharing and security alert systems; and (iii) absence of support resources.

Solution: 3e. Media houses should have defined safety policies for all media practitioners that offer: (i) specialised training (e.g., conflict sensitive journalism), including physical and digital security training, and access to appropriate security equipment; (ii) an administrative threat response and security alert mechanism providing liaison and coordination between representative platforms of media practitioners and local security authorities; and (iii) systems to provide adequate support to media practitioners most at risk, including emotional well-being care, insurance and compensation schemes.

Stakeholders: 3e. Federal, provincial and district governments, representative associations of media workers and owners, and media support groups

Problem: 3f. The system of accreditation for journalists is not professionally designed or managed.

Solution: 3f. A policy should be adopted which provides for clear, fair and uniform system of accreditation for journalists across Pakistan.

Stakeholders: 3f. Representative associations of media workers and owners, and media support groups

CHAPTER 4

PRINT MEDIA REGULATIONS

PRINT MEDIA REGULATIONS

Provisions in general laws affecting the print media as a sector

Introduction

i. The Article 19 of the Constitution of Pakistan, 1973, recognizes special importance of freedom of press, apart from the right to free speech. Courts have never been tired of emphasizing the importance of free press to the well- functioning of democracy. The statutory laws, however, have been consistent in burdening free speech rights of all kinds of publishers, and have been careful to place tight restrictions on establishing and operating newspapers, in contravention of constitutional guarantees. Courts have not developed principles guaranteeing press broad free speech rights, and have never questioned repressive and out-dated press laws in light of international jurisprudence and practice of modern democracies, which have for long done away with 19th century laws that are still operative in Pakistan.

ii. Wherever, right to free speech of press comes into conflict, directly or indirectly, with other legitimate interest, such as public order, security, protection against defamation, etc., legislature has been quick to push aside free speech rights, which is more foundational, arguably, than other legitimate government interests. Laws against press' right to speech are vague, restrictive, and vest executive with too much discretion to restrain, prohibit and penalize press for exercising speech. A bare perusal of use of press laws promulgated by colonials and currently effective in Pakistan can shock. Press laws continue to be used, not under any constitutional principle that is universally recognized to be a fundamental human right, but as outdated, rejected, coercive tool that are arguably unconstitutional under established international standards.

International Best Practices

i. The constitutions of modern democracies like the United States of

America hold freedom of the press as a necessary concomitant of the freedom of expression, the kind of freedoms that print media does not enjoy in Pakistan.

ii. Press is considered to be fourth institution outside the government as a check on the three official branches, i.e. executive, judiciary and legislative.[153] U.S. Supreme Court held fetters on press to be fetters on the people.[154] The broad administrative principle that any abridgement of speech and of free press must be prescribed by law, protect a legitimate interest and the restriction must be proportional.[155] English Courts have succinctly defined the status of rights of press vis-à-vis free speech rights of individuals, as following:

> *"The existence of a free press is an essential element in maintaining Parliamentary democracy. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by the proprietors, editors or journalists. It is because the media are the "eyes and ears" of the general public. They act on behalf of the general public. Their right to know and right to publish is neither more nor less than that of the general public. Indeed, it is that of the general public for whom they are trustees."* [156]

iii. Lord Denning, with broad strokes, laid down the scope of press regulation, which is more or less followed by established judicial systems:

> *"The freedom of the press is extolled as one of the great bulwarks of liberty. It is entrenched in the constitution of the world. But it is often misunderstood… it does not*

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[153] *New York Times v. Sullivan, 376 US 254; New York Times Company v. United States* (1971) 403 US 713.
[154] *Grosgian v. American Press Co.* (1935) 297 US 233.
[155] *Mc. Cartan Torkington v. Times.* (2000) 4 All ER 913.
[156] *A. G. v. Guardian.* (1988) 3 All ER 545.

mean that the press is free to ruin a reputation or to break a confidence or to pollute the course of justice or to do anything unlawful.

iv. It means that there is to be no censorship. No prior restraint should be placed on the press as to what they should publish. Not by a licensing system. Not by an executive direction. Not by Court by injunction. It means that the press is to be free from what Blackstone calls "previous restraint" or what our friends in the United States … call "prior restraint". The press is not to be restrained in advance from publishing whatever it thinks right to publish.[157]

v. It can publish whatever it chooses to publish, but it does so at its own risk. Afterwards, after the publication, if the press has done anything unlawful, they can be dealt with by the Courts. If they offend by interfering with the course of justice, they can be punished in proceedings for contempt of court. If they should damage the reputation of innocent people they may be made liable for damages."[158]

vi. Blackstone explained the rule against prior restraint by arguing that 'any form of prior restraint is a fetter on the free will of the people and an attempt to control the liberty of expression by administrative authorities'.[159] Whereas, legal consequences that a publisher might face is only a check on the exercise of that freedom to publish in itself, and hence not a fetter.

vii. European Court of Human Rights (ECtHR) while interpreting certain provisions of Official Secrets Act, 1989 recognized that the press has a special status of being guardian of public interest.[160] American Supreme Court in Nebraska Press Association v. Stuart[161]

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[157] In the same strain Lord Mansfield in *R. v. Dean of St. Asaph.* (1765) Vol. IV. Pp 151-2: "The liberty of the press consists in printing without any previous license, subject to the consequences of law." This is the opposite of how Britishers regulated press in colonial India.
[158] *Schering Chemicals v. Talkman.* (1981) 2 All ER 321.
[159] Blackstone's Commentaries. (1765) Vol. IV. Pp. 151-2.
[160] *Observer and Guardian v. UK.* (1992) 14 EHRR 153.
[161] (1976) 427 US 539.

noted, "The extraordinary protection afforded by the First Amendment carry with them something in the nature of a "fiduciary" duty to exercise the protected rights responsibly – a duty widely acknowledged but always observed by editors and publishers."

viii. Indian Supreme Court has also been emphatic about expanding the scope of speech rights to press. In Express Newspapers Ltd. V. UOI,[162] it said, "The necessary corollary thereof is that no measure can be enacted which would have the effect of imposing pre-censorship, curtailing the circulation or restricting the choice of employment or unemployment in the editorial force. Such a measure would certainly tend to infringe the freedom of speech and expression and would therefore be liable to be struck down as unconstitutional."

ix. U.S. Supreme Court in *Near v. Minnesotta,*[163] holding prior restraints to be suspicious struck down a law that allowed judges to enjoin publication of "malicious, scandalous and defamatory" newspapers. Court held that although curbing such speech is a legitimate government interest, but it was not sufficient to justify prior restraints except "in exceptional cases." Therefore, in *New York Times v. United States,* court vacated an injunction restraining publication of the Pentagon papers regarding top secret documents on Vietnam and rejected the objection that the publication jeopardized national security. Court stated that prior restraint was impermissible unless publication involved jeopardized the country's safety only in wartime, threatened public safety, incited violence or governmental overthrow.[164]

x. Licensing or censorship has been abolished in English and other established democracies. However, trial of offences after proper hearing of certain offences under statutes remains in force. For

[162] AIR 1958 SC 578 : (1959) SCR 12.
[163] (1931) 283 US 697.
[164] See also, *Organisation for a Better Austin v. Keefei.* (1971) 420 US 115.

instance, the Obscene Publications Act, 1959 permits search and seizure of obscene articles reasonably suspected of being in possession for publication. Similarly, the Post Office Act, 1953 and the Customs and Excise Management Act, 1979 authorize officials to retain and destroy offending materials under statute, being imported or transported within the jurisdiction.

xi. Scope of injunctions on exercise of speech of press remains narrow. No past offence can become a ground for issuing an injunction to restrain future publication or any newspaper or periodical.[165] Prior restraint is considered as "informal censorship," which includes "blacklisting" by an administrative authority. However, this does not prohibit a court from banning further distribution or sale of already published materials, found to be illegal.[166] However, even offensive speech should be protected, in principle.

xii. United States like other democracies does not give press any special privilege. Justice Burger in *First National Bank of Boston v. Bellotti,*[167] clarified, "There are those who view the Press Clause as somehow conferring special and extraordinary privileges or State on the "instituting of press." I perceive two fundamental difficulties with such a reading of the Press Clause does not suggest that the authors contemplated a "special" or "institutional privilege" … The second fundamental difficulty with interpreting the Press Clause[168] as conferring special status on a limited group is one of definition. The very task of including some entities within the "institutional press" which excluding other is reminiscent of the abhorred licensing system that the First Amendment wanted to ban."

xiii. Initially, in United States newspapers did not have any constitutional protection against search of their premises for evidence of crime, under a warrant based on 'probable cause'.[169]

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[165] *Near v. Minnesota.* (1931) 283 US 697.
[166] *Kingsley Books v. Brown.* (1957) 354 US 436.
[167] 435 US 765.
[168] That is, "Congress shall make no law … abridging the freedom of speech, or of the press;…"
[169] *Zurcher v. Stanford Daily.* 436 US 547 (1978).

Subsequently, "The Privacy Protection Act" was enacted which limited power of the state officials to obtain evidence from news media premises unless it showed reasonable cause that evidence would be destroyed if sought be subpoena.

xiv. Financial burdens on speech and press are also held declared. Supreme Court of U.S. voided a New York statute in *Simon & Schuster Inc. v. New York State Crime Victims Board,*[170] that authorized officials to confiscate any income earned by an "accused or convicted of a crime" from publications relating to the crime. Court held that no content-based speech can be abridged even if it related to crime. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Court held that although government had a compelling interest in facilitating to crime victims, however, it had "little if any interest in limiting such compensation to the proceedings of the wrongdoer's speech about the crime."

xv. Unlike Pakistan, which still vests government with control over the raw materials that go into production of publications and circulation of finished products, U.S. Supreme Court held unconstitutional such limitations, as following:

> "A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of "material" to go into a newspaper, and the decisions made as to limitations on the "size" of the paper, the 'content' and 'treatment' of public issues and public officials – whether fair or unfair – constituting editorial control and judgment. … We never thought that the First Amendment permitted public officials to dictate to the press the contents of the 'news' columns or the slant of its editorials."[171]

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[170] (1991) 502 US 705.
[171] *Miami Herold v. Tornillo.* (1974) 418 US 241; *Hannegan v. Esquire.* (1946) 327.

xvi. Libel is a contentious issue even in advanced democracies. In U.S. laws regulating libel apply with equal force to press, although if a plaintiff is a public official or figure, or even if plaintiff is a private person but defamation is of public concern, the rule of actual malice must be proved.[172] Opinion automatically gets constitutional protection, unless it relates to matters, which are not of public interest, and includes 'false factual connotation'.[173]

xvii. Similarly, press is not exempted from ordinary taxation. In Associated Press v. NLRB,[174] the Court held that press could not claim exemption from liability to pay non-discriminatory taxes levied by the government.

Press Regulation in Pakistan: Past is Present

Print Media Regulation: Colonial "Heritage"?

i. Scholars have pointed that press laws in India and Pakistan are to a large extent continuation of repressive colonial laws, which the founder of Pakistan, Quaid-e-Azam Muhammad Ali Jinnah termed as black laws.[175] The colonial laws regulating press were to ensure control of a foreign invading government over the fundamental human right of natives to free speech. The three features of Colonial legislation continue to this day: registration requirements of newspapers, subjection of publishers to excessive executive control and regulation of content with various civil and criminal statutes.

Licensing & Registration

i. K. M. Shrivastava in his well-researched paper, *Media Laws: A Historical Perspective,*[176] traces the source of present print media registration laws in India, which are effective in Pakistan as well, as following:

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[172] *New York Times v. Sullivan.* (1964) 376 US 254 *(supra).*
[173] *Gertez v. Robert Welch Inc.* (1974) 418 US 323.
[174] 301 US 103.
[175] He is reported to have remarked against promulgation of laws curtailing free press as following: "All my life I have been fighting against these black laws, now you expect me to sign it. No, I will put my foot down on it". Daily Sindh Observer, Karachi, March 11, 1948.
[176] P. 26, published in a monograph, *Mass Media in India 2009,* commissioned by Ministry of Information and Broadcasting Government of India.

> "Licensing … was applied to all kinds of publications. … The next important event in the field of media laws was the enactment of the Press and Registration of Books Act (25 of 1867). This Act is still in force, of course with amendments from time to time. The object of this Act was to provide for the regulation of the printing presses and of periodical containing news, for the preservation of copies of books and for the registration of books. It contains rules for the registration of books. It contains rules for the making of declaration by the keepers of presses and publishers of newspapers (part II); rules regulations for the delivery of books (Part III); penalties (Part IV); registration of book (Part V). Part VI of this Act gave powers to the government to make rules and to exempt books or newspapers from the provisions of this Act. The Act 55 of 1955 added Part VA to provide for appointment of Registrar of Newspapers."

ii. Although newspapers are not licensed anymore, however, cumbersome declaration and registration requirements are illegitimate restrains on free speech rights of newspapers.

Excessive Discretion of Executive

British colonials vested excessive authority in executive to control print media. K. M. Shrivastava, further notes:

> *"When the Indian language press became very bold the Vernacular Press Act 1878 was introduced. It was comprehensive and rigorous, aimed at "better control" of the language press. It empowered any magistrate of a district or a commissioner of police in a presidency town to call upon the printer and publisher of a newspaper to enter into a bond undertaking not to publish certain kind of material, to demand security, and to forfeit, if it was thought fit, such presses and confiscate any printed matter as it*

deemed objectionable. No printer or publisher against whom such action had been taken could have recourse to a court of law."[177]

Content Regulation

A plethora of laws restricted free speech in newspapers and other publications, some of which are still effective in Pakistan. A few major statutory instruments promulgated by British colonials against press include:

- Foreign Relations Act, 1932[178] ; Indian Press (Emergency Powers) Act, 1931; Official Secrets Act 1923; Customs Act 1878[179]; Telegraph Act 1885[180]; Indian Penal Code 1860[181]; Newspaper (Incitement to Offences) Act 1908,[182] etc.

Predecessor in Law: Press and Publications Ordinance, 1960

i. State's regulation of free speech by severely restricting access to running free press has not changed since Pakistan's inception. The legal regime continues to put excessive prior restraints on operating news or print publications, unimaginable in established democracies – instead of holding publishers accountable for legal consequences of their exercise of speech.

ii. The first organized state level intervention in operations of press was initiated by then President General Ayub Khan who promulgated Press and Publications Ordinance, 1960 in 1960. Mere comparison of key provisions of the said ordinance, as given below, with current effective laws would ring striking similarity. In fact, the legal regime has continued to follow in the tradition of putting immense restrains.

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[177] *Mass Media in India 2009,* Op. Cit. P. 27.
[178] It criminalized "publication of statements likely to prejudice the maintenance of friendly relations between the British government and the governments of certain foreign states," Ibid. p. 30.
[179] It "gave power to the central government of prohibit or restrict the importation or exportation of goods into or out of India," Ibid. p. 28.
[180] It "gave power to the central government or provincial governments of an official specially authorized by the government to take possession of licensed telegraphs and to order interception of telegraphic messages," ibid. p. 28.
[181] It criminalized publishing obscene, defamatory, seditious content.
[182] It "gave power to local authorities to take judicial action against the editor of any newspaper, which indulges in writings calculated to incite rebellion," ibid. p. 28.

iii. The Ordinance of 1960 spread over 30 pages, dealing with printing presses, newspapers, periodicals, books and other publications, empowered the government to get security deposits,[183] ranging from Rs. 500 to Rs. 10,000 (in 1960s), from printing presses for violating rules against printing 'objectionable material'. Although right to appeal before High Court lay, government still had the right to forfeit the deposit and even ban printing press from publishing materials.

iv. The law also required 'declaration' from publishers, apart from registration with Press Registrar. The declaration was prima facie evidence of authorization of any printed material which may be sued in a civil or criminal proceeding. Non-publishing the publications for a given period or absence from Pakistan for more than three (3) months, without appointing a nominee who took an undertaking for all responsibilities of operations, led to expiry of the declaration, requiring its renewal from the very start. Another requirement for starting a publication was showing strong financials along with an editorial board having 'adequate training or experience in journalism' or 'reasonable educational qualifications'.

v. The Ordinance of 1960 put excessive restrictions on exercise of free speech through any kind of publication, and gave executive excessive discretion to prohibit speech on vague and subjective notions. A 'printing establishment' could be prohibited from publishing any material, as well as forfeiture of its security deposit, if the executive established that the published material contained obscenity, indecency, defamatory remarks, panic creating information, frustration, unverified information, along with following:

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[183] This strategy was first employed by British colonials: "To meet the situation posed by the civil disobedience movement of 1930, the government promulgated the Indian Press Ordinance to provide for "better control of the press". This revived the stringent provisions of the repealed Press Act of 1910. Some 130 newspapers had to deposit securities, nine refused to do so and suspended publications." Research, Reference and Training Division National Documentation Centre on Mass Communication (Ed.), K. M. Shrivastava, et. al. Mass Media in India 2009, Ministry of Information and Broadcasting Government of India. P. 28.

"(a)contain reports of crimes of violence or sex, produced in a manner which was likely to excite unhealthy curiosity or urge imitation or which might incite interference in the administration of law or with the maintenance of law and order or which might encourage non-payment of taxes, including land revenue;

(b) incite or encourage the commission of an offence of murder or any offence involving violence or amounted to an abetment of the same;[184]

(c) directly or indirectly condemn the creation of Pakistan or advocate the curtailment or the abolition of the sovereignty of Pakistan in respect of all or any of its territories;

(d) bring into hatred or contempt the government established by law in Pakistan or any class or section of the citizens of Pakistan; and

(e) create feelings of enmity between the people of the two wings of Pakistan."

vi. Moreover, publications against joining police or armed forces, or prejudicing its administration would also fall within the purview of the offences listed above. Executive could punish the offender by imposing a fine of Rs. 2,000/- or imprisoning for not more than six months or both. Executive was also vested with powers of seizing, destroying such, or unauthorized, publications, and/or stop its transmission through any means.

vii. Strict controls on ownership were also put into place. Foreigners were prohibited from owning any share in newspapers, unless the government approved of it, but not for more than twenty five (25) percent.

Mother of all Restrictions: Press, Newspapers, News Agencies and Books Registration Ordinance 2002

i. The Press, Newspapers, News Agencies and Books Registration

[184] This provision was perhaps inspired by the operative clause of section 4(1) Indian Press (Emergency Powers) Act.

Ordinance (XCVII of 2002) (henceforth referred to as the 'Ordinance of 2002') remains to be the true successor to the Ordinance of 1960. Ordinance of 2002 was further amended in 2007 to expand on the previous ordinance's mission to penalize and restrain a publisher's right to free speech and publish.

ii. There is such a thing as "unauthorized newspaper" and "unauthorized press" in Pakistan.[185] The Ordinance of 2002 requires every 'keeper of printing press', who publishes a 'book' or 'paper',[186] to make 'declaration' under Section 4 as prescribed under Section 6. Section 6 requires every 'printer and publisher' or every newspaper or any owner agency to personally or by agent appear before District Co-ordination Officer (DCO), to make a declaration, as given in Form-B under the statute. The declaration is not an undertaking or bond, rather only requires title, periodicity and other particular, which may include bank account of the paper or agency. There is no requirement of depositing 'security'. It is no different than mandatory requirement part of the incorporation process of a private or public company. The declaration automatically becomes nullified if the printer or publisher leaves Pakistan for a period more than one year under Section 9, or fails to publish the newspaper within three (3) months under Section 11, or if there is any other violation of the terms given under the Ordinance or rules.

iii. The publishers are required to deposit 'duplicate originals of the declarations' in the office of DCO. Under Section 21, publisher is also required to deliver free printed copies of the whole of every book, and under Section 24, two free copies of each issue of newspaper, to the Provincial government.

Registration Process

i. Part VI of the Ordinance of 2002, created Press Registrar for the purpose of registering key particulars of newspapers, such as place

[185] As defined in Sections 2(t) & 2(v) under Press, Newspapers, News Agencies & Books Registration Rules, 2009.?

[186] Defined under Section 2(b) & (c), respectively, it includes newspapers, or any document, volume, pamphlet, in any language, including 'music, map, chart or plan separately printed or lithographed'.?

of publication, names of owners, retail selling price per copy, etc. In order to manage registration process of newspapers, in 2009 Press, Newspapers, News Agencies and Books Registration Rules was promulgated for issuance of registration and renewal certificates, which is valid for three years from the date of issuance.

ii. Section 8 gives the Press Registrar authority to act under the provisions of the Ordinance of 2002 and the Rules, and assume any others powers 'he deems fit and appropriate to run the affairs of the office of Press Registrar'. It purports to give the registrar immunity from personal liability or tort claims for acts done in good faith.

Content Regulation

i. Section 5 of the Ordinance of 2002 requires publishing the newspaper in accordance with the Ordinance and relevant laws. It does not, in itself, put any other prior restraints on publishing any content, except by virtue of subjecting to many other provisions of the Ordinance and connected laws. Therefore, in 2007, an amendment was brought, and Section 5-A was inserted to immensely expand restrictions on speech rights of publishers, reviving vague, broad, colonial-age restraints on free speech:

> ***"5A. Restriction on publication of certain material.-***
> *(1) No printer, publisher or editor shall print or publish in any book, periodical or paper any material which consists of,-*
> *(a) photographs or pictures of suicide bombers, terrorists (except as required by law enforcing agencies for purposes of investigation), bodies of victims of terrorist activities, statements and pronouncements of militants and extremist elements and any other thing which may, in any way, promote, aid or abet terrorist activities or terrorism;*
> *(b) graphic or printed representation or projection of statements, comments, observations or pronouncement based on sectarianism, ethnicism or racialism;*

(c) any material, printed or graphic, that defames, brings into ridicule or disrepute the Head of State, or members of the Armed Forces or executive, judicial or legislative organs of the State;

(d) any material that is likely to jeopardize or be prejudicial to the ideology of Pakistan or the sovereignty, integrity or security of Pakistan;

(e) any material, photographic or in print, that is likely to incite violence or hatred or create inter-faith disorder or be prejudicial to maintenance of law and order; and

(f) any material that is in conflict with the commonly accepted standards of morality and decency and which promotes vulgarity, obscenity, and pornography.

ii. West Pakistan Maintenance of Public Order Ordinance, 1960 goes beyond all established norms of press regulation and employs staggering 'preventive measures' that restrain publishers prior to any fact of breach of laws. Section 6 of the said Ordinance states:

"Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of public order, may, by order in writing addressed to a printer, publisher or editor–

(a) prohibit the printing or publication in any document or class of documents of any matter relating to a particular subject or class of subjects for a specified period, or in a particular issue or issues of a newspaper or periodical;

(b) require that any matter be published in any particular issue or issues of a newspaper or periodical, and may while doing so specify the period during which and the manner in which such publication shall take place;

(c) require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny;
(d) prohibit for a specified period the publication of any newspaper, periodical, leaflet, or other publication, or the use of any press;
(e) require that the name and address of any person concerned in the supply or communication of any news, report or information be furnished to such authority as may be specified in the order;
(f) require that any document connected with the news, report or information referred to in clause (e) be delivered to such authority as may be specified in the order ..."

iii. Section 7 further restricts circulation of newspapers and curtails rights of its audiences to receive information by giving executive power to prohibit entry of any newspapers into provinces, which in the opinion of the government violates any provision of the Ordinance. There is no requirement for judicial authorization or oversight under any section of the Ordinance. There are other statutes which complement restrains on circulation of publications, such as:

- Section 9 of Pakistan Post Office Act, 1898 empowers central government to regulate newspaper circulation and distribution while Section 20 deals with restriction of printed materials.
- Sections 27A and 27B of Custom Act, 1969 related to prohibition of distribution and confiscation of newspapers by post.

iv. Foreign Relations Act, 1932, which was passed with the object of providing against the publication of statements likely to prejudice the maintenance of friendly relations between the British government and the governments of certain foreign states, continues to be applied against any statements prejudicing

relations between Pakistan's governments and other states.

v. There are many provisions in Pakistan Penal Code, 1860 which further the cause of restricting free speech rights of the press, some of which were added after Pakistan's independence:

- **Section 123-A**[187] criminalizes speech condemning the creation of Pakistan or advocates the curtailment or abolition of the sovereignty of Pakistan shall be punished with rigorous imprisonment up to ten years and shall be liable to fine. This section was instituted in 1950.

- **Section 124-A** is related to sedition, which states:

  "124-A. Sedition. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Central or Provincial Government established by law shall be punished with imprisonment for life or shorter terms to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
  Explanation 1: The expression —disaffection— includes disloyally and all feelings of enmity.
  Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or

[187] "Condemnation of the creation of the State and advocacy of abolition of its sovereignty. (1) 1Whoever, within or without Pakistan, with intent to influence or knowing it to be likely that he will 2influence, any person or the whole or any section of the public, in a manner likely to be prejudicial to 3the safety 9[or ideology] of Pakistan, or to endanger the sovereignty of Pakistan in respect of all or 4any of the territories lying within its borders, shall by words spoken or written, or by signs or visible 5representation, 9[abuse Pakistan or] condemn the creation of Pakistan by virtue of the partition of 6India which was effected on the fifteenth day of August, 1947, or advocate the curtailment or 7abolition of the sovereignty of Pakistan in respect of all or any of the territories lying within its 8borders, whether by amalgamation with the territories of neighbouring States or otherwise, shall be 9punished with rigorous imprisonment which may extend to ten years and shall also be liable to fine."?

disaffection, do not constitute an offence under this section.
Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

- **Section 153-A** of the penal code punishes for a term up to five year and with fine to whoever promotes or incites disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or casts or communication.

- **Section 153-B** states that inducing students to take part in political activity is punishable with imprisonment up to two years or with fine or both. It was inserted with effect from June 7, 1962.

- **Section 292** prohibits sale, distribution, import, export, etc. depicting representations of 'obscene' objects. The Section, nor the commentary, has provided any narrow limits or definition of what obscene objects might constitute.

- **Section 295-A** sanctions 'deliberate and malicious' acts that cause 'outrage' of religious feelings of any class or 'insult its religion or religious beliefs'.

Cancellation of Declaration

i. The Executive is empowered, as noted above, with judicial powers to adjudicate upon complaints to cancel "declaration" of a newspaper under Sections No. 19 & 20 of the Ordinance of 2002, subject to established constitutional and administrative principles. The said sections give executives broad powers to conduct investigations on content published in newspapers, books, etc., and

based on enquiries order cancellation of licenses of newspapers. Executive can also suo moto move against publications, conduct investigations, and after giving show cause notice and a hearing, cancel the declaration, and penalize the printers or publishers. Under Section 20, the printer or publisher has the right to judicial review by way of appeal directly to High Court.

ii. *In Qasiar Nadeem Saqi vs. District Coordination Office (DCO), Hafizabad* (PLD 2006 Lahore 76), the Court, while recognizing authority of the executive to cancel declaration of newspapers refused to accept cancellation of declaration on grounds of 'allegation of blackmailing and malicious motivation against the newspaper to draw capital out of the same for the benefit of political adversaries of the respondent'. Court upheld executive's judicial authority to conduct investigation and deliver 'speaking order', with reasoning, against newspapers, and held:

> *"No independent or concrete material was available on record to establish any such allegation against the newspaper. Order passed by the District Coordination Officer cancelling the declaration could not be accepted as a speaking order as-perusal of the same showed that he had recorded no reasons or findings of his own in that order and had not alluded to any particular material or evidence on the record against the newspaper and he had simply recorded his conclusion by referring to the findings recorded and the recommendations made by the Enquiry Officer appointed by him. Freedom of press was a fundamental right guaranteed by Art. 19 of the Constitution and such a right of the appellant (owner of newspaper) could not be snatched away by District Coordination Officer in such a slipshod manner which could hardly withstand any judicial scrutiny---District Coordination Officer, in circumstances, was not justified in imputing something to the newspaper for*

which there was no physical data or material available on the record---Report submitted by the Enquiry Officer appointed by the District Coordination Officer and orders passed by him were nothing but conjectural in that regard which were set aside by the High Court in appeal."

Restriction on foreign ownership

i. Section 12 severely restricts foreign ownership of newspapers in Pakistan, as following:

> *"No person who is not a citizen of Pakistan shall own or hold any interest in any newspaper printed or publish in a province except with the previous approval of the Government, and no such person shall in any case own or hold more than twenty-five per cent of the entire proprietary interest of any such newspaper, whether in the form of shares or by way of sole ownership, partnership or otherwise."*

ii. Although some limits on foreign ownership of the media are considered legitimate, excessive limits violate Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR):

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." [Emphasis added.]*

The problem is exacerbated here by the fact that the government has the power to approve or refuse foreign ownership levels.

Criminalizing Press

i. A contravention of the provisions[188] or making false statements of

[188] Sections 3 and 4. Whereas, Section 16, 21, and 24 are only punishable by fines ranging from Rs. ?,000 to Rs. 20,000, at maximum.?

Ordinance of 2002 is punishable by fine not exceeding Rs. 20,000 with or without imprisonment not exceeding six months or both, under Sections 25 to 32. Section 36, empowers a Magistrate of the First Class[189] to adjudicate complaints under the said sections.

Press Council of Pakistan Ordinance, 2002

i. The Press Council of Pakistan Ordinance, 2002 established a statutory press council with the objective to develop, maintain and enforce professional standards, Ethical Code of Practice, process complaints and media independence in the print sector. The council comprises of the members from All Pakistan Newspaper Society (APNS), the Council of Pakistan Newspapers Editors (CPNE), the Pakistan Federal Union of Journalists (PFUJ) and government officials and legislators.

ii. Like other complaint councils, it is vested with power to adjudicate the complaints. It has powers to call witnesses to open hearings against individuals and organizations, and recommend apologies, fines, or request for suspending or withdrawing publications. The Ordinance also bars simultaneous litigation of complaints in courts. It prohibits the Council from forcing the publisher or journalist or an editor from revealing source of information.

iii. The Ordinance conceived the council to be an independent entity, co-funded by government grant as well as by registration fees collected from media outlets. The Council comprises 19 members, appointed for a term of three years, nominated from print media sector and civil society. The Chairman is appointed by the President of Pakistan.

iv. In reality, the Press Council of Pakistan has failed to take concrete steps to enforce the ethical code of practice for the print media, and is criticized for being dysfunctional and ineffective.[190] In 2014, it was reported that 'the positions of registrar, administration and

[189] It is a criminal court, which operates under criminal procedure.?

[190] "The government-appointed Press Council of Pakistan (PCP) is still in its infancy, and though it has a codified system of receiving and addressing complaints, it remains largely ineffective," p. 47. Aidan White (Ed.) *The Trust Factor: An EJN Review Of Journalism And Self-Regulation,* Ethical Journalism Network. (London).?

finance directors-general, administration and finance directors, deputy directors and assistant directors, database deputy director and judicial deputy director have not yet been filled.'[191] The Ordinance did not make provisions for service structure and appointments. The activities conducted by the Council,[192] remain limited to capacity building, information sharing, etc., but not enforcement of code of conduct on print media.

Judicial Treatment

Broad Judicial Precedent on Free Press

i. The higher and apex courts have recognized application of wide-ranging exceptions to free speech under Article 19 of the Constitution and other statutory restrictions to press. The majority of case law against print media revolves around claims against defamation, false news, integrity of Islam, Pakistan and governmental institutions. We could not identify a single precedent where courts criticized excessive licensing and regulatory restrains on operating printing press or newspaper establishments.

ii. In Independent Newspapers Corporation (Pvt) Ltd vs. Chairman Fourth Wage Board And Implementation (PLC 1993 Supreme Court 673), Supreme Court in conformity with international protections for free press, laid down important principles for regulation of newspaper:

> *"Any measure which directly or indirectly puts restraint on or curtails the circulation of newspaper, due to any factor, including cost of production and resultant increase in the price thereof should, in so far as possible be avoided. Article 19 of the Constitution*

[191] Riazul Haq, Rudderless: Press Council of Pakistan, a name with no faces, Express Tribune, Pakistan (September 20, 2014). Url: <http://tribune.com.pk/story/764674/rudderless-press-council-of-pakistan-a-name-with-no-faces/> (Accessed n 10-04-2016). The Report also shed light on dismal administrative affairs of the PCP, as following: "The PCP receives Rs10.5 million per year from the government. It has no sub-offices in any province, and although a building was rented in Lahore for Rs. 45,000 per month, it is "almost non-functional" as no official has appointed there … Raja Mohammad Shafqat Abbasi, the chairman of the body, denied that the Lahore office was not functioning, saying a total of three persons were on duty. Abbasi said that PCP offices could not be set up in provinces due financial constraints as the PCP, according to him, was receiving negligible funding."?

[192] As reported in various online media outlets. Official website of PCP (www.presscouncil.org.pk/) remains non-functional.?

guarantees right of freedom and speech and expression. It ordains that there shall be a freedom of press subject to reasonable restrictions imposed by law elucidated therein. The freedom of expression includes the right to receive information through organs of public opinion and the freedom of press on its turn rests on the assumption that there is a wide dissemination of information. Such dissemination inevitably contemplates absence of restraints. Thus any measure which directly or indirectly puts restraint on or curtails the circulation of newspaper, due to any factor, including cost of production and resultant increase in the price thereof should, in so far as possible, be avoided."

iii. This is a rare judgment, which may amount more to be an obiter dicta, than an example of judicial intervention against laws restraining free press. The Court did not clarify what kinds of restraints may be unconstitutional, and did not assess whether many of the existing repressive laws comply with guarantees against prior restraints on publishing newspapers. For instance, Court did not rule whether Section 9 of Pakistan Post Office Act, 1898 empowers central government to regulate newspaper circulation and distribution while Section 20 restricts of printed materials; nor did it account for severe restrictions on raw materials that go into production of newspapers under the Newsprint Control Act, 1971.

iv. In a case[193] where plaintiffs sought damages and restraining orders against 'defendants from publishing and/or circulating any false, libelous, slanderous, defamatory, malicious and mala fide news against plaintiffs', Court rejected blanket ban on publications while upholding wide-ranging restraints and Article 19 exceptions against press, as following:

[193] Aligarh Muslim University Old Boys Cooperative Housing Society Limited vs. Muhammad Yousaf Qureshi (1997 CLC 918).?

"Liberty of press would mean complete freedom to write and publish without censorship or restriction for preservation of just and Islamic Society. Liberty of press would extend immunity only to publication with truth, with good motives, for justifiable ends. General or absolute order requiring a newspaper not to publish news or story could not be supported by any cannon of law on any ground whatsoever. Subject to law of land and rights available to citizens, members of press were always obliged and owed duty towards citizens to act with complete freedom, independence, responsibility and circumspection so that they did not invade and infringe rights available to citizens. Any invasion of such right could be visited with penal consequences but not in summary manner by granting injunction on the terms sought by plaintiffs."

v. In a rare instance of liberal interpretation, the Court refused to narrowly apply provisions of "Press (Emergency Powers) Act 1931, which conventionally was a tool to limit free speech. The case Before Muhammad Sharif, Cornelius and Muhammad Jan, JJ (PLD 1949 Lahore 282), concerned 'newspaper articles … criticising mode of Muharram observances and mourning as idolatrous and as provoking ridicule of civilised nations'. Court held the views of the publication which examined 'genesis of Muharram in cold light of reason and logic and holding the theory of "Divine Imamat" responsible for bringing into existence people who almost worship their leaders' not to be in contravention of the said Act.

Tax Treatment

i. Special tax treatment has been given to publications 'carrying news of contemporary period' under the Sales Tax Act, 1990 for the following reasons in a case involving exemption of sales on 'out of date/period newsprint, newspapers, journals, periodicals and books', Court held:

"In item No.32 of the Sixth Schedule of the Sales Tax Act, 1990, the exemption under S.13 of the Sales Tax Act, 1990 was for newsprint, newspapers, journals,

periodicals and books but excluding the directories. Newsprint, newspapers, journals, periodicals and books etc. could not be treated to be scrap or wastepaper. Even if the newspapers were not of the same date or of a current period, their contents had the academic value and they continue to be the newspapers and the mere fact that they were out of date that did not take away the news element/academic value there from. Only the directories had been excluded by the Legislature intentionally but all the other items mentioned under Entry No.32 of the Sixth Schedule of the Sales Tax Act, 1990 came within the meanings of newspapers though not carrying news of contemporary period and the exemption provided under S.13 of the Sales Tax Act, 1990 was allowable and would not be liable to sales tax." [Emphasis added.]

ii. The Court, while excluding recyclable news publications from the statutory definition of 'scrap or wastepaper', did not find the purpose of exemption to be stemming from protection against undue burden on free speech under Article 19 or 19A of the Constitution of 1973.

Self-Regulation

The Rationale

i. Self-regulation of print media is recognized to be a sophisticated way of avoiding excessive government controls on workings of media, and holding media accountability to public through self-correction.

ii. The answer to following questions is in negative when it comes to assessing effectiveness or even existence of self-regulation mechanisms in Pakistan:

"Does self-regulation work? Are journalists bound by ethical codes and free to act according to conscience?

> Do media houses have credible internal systems for dealing with conflicts of interest and complaints from the public? Are there national accountability systems, such as [Press Council of Pakistan], that are trusted by owners, journalists and, most importantly, by the public at large?"[194]

iii. A report published by Ethical Journalism Network International, which declared Norway to be a 'standout model of self-regulation', found its success to be in 'the unity and solidarity of people across all platforms of media'. It found that the 'system works best in Norway and a few other countries because all media players – in television, online and print – pull together. They follow one, single code of conduct which is recognised and respected inside journalism and which applies to media on all platforms.' In addition, Norway is also a pioneer of ground-breaking transparency by allowing public access to complaints hearings.

iv. The report attributed to the failure of self-regulation systems in Pakistan, in establishing public trusts, to 'indifference and divisions within the media community'. There is a consensus among media owners and practitioners that current state of self-regulation is almost non-existent and is limited in-house enforcement of ethical standards and complaint systems. Almost all dailies give up their space to entertain public comments and replies on their publications. Moreover, it is also recognized that financing self-regulatory bodies mutually that ensure independence and neutrality has not yet taken place. Some experts suggest that 'public money should be used to pay for handling public complaints as this is a public-interest activity'.[195]

v. Pakistan Media Commission Review, appointed by Supreme Court of Pakistan, in its report held media cross-ownerships to be an impediment in effective self-regulation mechanisms:[196]

[194] Aidan White. Op. Cite. P. iv.?
[195] Aidan White. Op. Cit. P. 48-56.?
[196] Pakistan Media Commission Review, Prevention of independent scrutiny of print and electronic media. Url: http://mediacommissionreview.org/prevention-independent-scrutiny-print-electronic-media/#.VwqhRJx96M8 (Accessed on 10-04-2016)?

"Cross-media ownership prevents independent scrutiny by print media of the content, standards and policies of the electronic media owned by the same group. And vice versa while this is not a conventional "corrupt practice", cross-media ownership deprives citizens from access to independent evaluation of the content of various media."

Code of Conducts in Place (as of 2016)

i. As noted earlier, although voluntary codes of conduct have been drafted by many media houses, for external and internal self-regulation, however, numerous stakeholder groups have not been able to reach consensus among themselves and with governments to have an effective, industry-wide complaint cell.

ii. Pakistan Federal Union of Journalists (PFUJ) drafted a code of ethics in 2008 that included a system of self-regulation that "promotes editorial independence and high standards of accuracy, reliability, and quality in media." The draft invited comments from editors, media owners and journalists. It proposed a complaints commission mechanism that would cover both print and broadcast media for enforcement of ethical codes. The editors' body, the Council of Newspaper Editors (CPNE), also came up with its own code which was acceptable to the publishers' body, the All Pakistan Newspapers Association (APNS). Many other news outlets followed lead and developed their own codes of conducts, which do not vary much in content, and serve internal purposes – whereas the public self-regulatory complaint systems remain dormant.[197]

Recommendations

Problem:4a. Registration, declaration and renewal processes amount to informal licensing and even prior censorship while the executive is

[197] Some other independent codes of conduct include: Press Council of Pakistan Code of Conduct: http://presscouncil.org.pk/ethical-code-ofpractice/; Pakistan Federal Union of Journalists: http://pfuj.pk/code-2/; Geo TV's code of conduct: http://www.geo.tv/asool/; Dawn newspaper's Code of Ethics and role of Readers' Editor: http://www.dawn.com/code-of-ethics/ http://www.dawn.com/news/1124403; The Express Tribune's Code of Ethics: http://tribune.com.pk/code-of-ethics/.?

vested with expansive powers to investigate, search, seize and destroy publications without judicial oversight or authorisation.

Solution:4a. The registration regime of print publications should be drastically simplified to the following principles: (i) the system of declarations should be done away with. Registration should be transformed into a purely technical process requiring no permission and no executive discretion to refuse registration; and (ii) the system should be overseen by the general registrar of companies. At a minimum, the executive should not exercise any regulatory power over the media and any body that does should be protected against political interference.

Stakeholders:4a. Federal and provincial governments, representative associations of media workers and owners, civil society and media support groups

Problem: 4b. Prior restraints and disproportionate criminal and civil restrictions on the content of what is allowed to be published continue to apply.

Solution:4b. All laws which impose restrictions on the content of what may be published should be reviewed and amended to bring them into line with international standards.

Stakeholders:4b. Federal and provincial governments, representative associations of media workers and owners, civil society and media support groups

Problem: 4c. Lack of a central code of ethics for media and an ineffective and insufficiently transparent complaints mechanism to deal with public complaints about print media content.

Solution:4c. A national dialogue with key stakeholders should be held to reform the system of complaints so as to create an appropriate and effective mechanism (whether self-regulatory or co-regulatory nature). This new mechanism should include a central code of conduct to be developed for and endorsed by the media sector.

Stakeholders:4c. Representative associations of media workers, managers and owners, and media support groups

Problem: 4d. Unrealistic limitations on ownership, cross-ownership and foreign ownership of the media.

Solution: 4d. The rules in this area should be reviewed and amended so as to provide for a realistic system for preventing undue concentration of media ownership and undue foreign ownership while allowing for investment in and growth of the sector.

Stakeholders:4d. Federal and provincial government, representative associations of media owners and workers, civil society, media support groups and lawyers

CHAPTER 5

PRIVATE SECTOR BROADCASTING

PRIVATE SECTOR BROADCASTING

Regulatory structure, licensing, oversight, ownership, competition, digitalization, diversity/pluralism

Introduction

i. Given that Pakistan is set for transition into Digital from Analogue based system by the end of year 2016, policy makers need to understand competitive and regulatory aspects that have been time tested in jurisdictions where broadcast industry has shifted to digital for a long time. This section would not be purely about statutory or jurisprudential aspects of broadcasting industry in Pakistan, but also inform the readers about broad-based, established norms and constitutional principles, rooted in economic and policy considerations, on global standards of broadcasting regulations. We begin our analysis by taking a broad picture of what broadcasting industry stands for and how it operates.

ii. It is a truism that broadcasting remains a highly regulated activity, as opposed to other mediums employed for expression and speech such as print media, internet, etc. In Pakistan, the regulation of electronic media, no less than print media, has for long been restrictive and at some points beyond the legislative and administrative mandated given to government, and *ultra vires* of constitutional limits. In 2002, Pakistan allowed private broadcasters to air their networks to public and established supposedly an independent media regulatory authority, that is, Pakistan Electronic Media Regulatory Authority (PEMRA).[198] Pakistan's political governments have been committing transgressions of constitutional protections granted to

[198] Muhammad Aftab Alam extensively deals with the history of liberalization of airwaves of Pakistan's broadcasting industry in 'Broadcast Regulation in Pakistan: The Need for an Enabling Regulatory Regime,' The Institute of Social and Policy Sciences (I-SAPS) Islamabad, Pakistan.

broadcasters, such as rule against arbitrariness, procedural fairness and free speech, by too strictly regulating its activities, from its inception to operations. Despite the explosion of electronic media post-2002, electronic media has not reached its potential at par with modern democracies, due to technological determinants such as low bandwidths, analogue system, cumbersome and costly encryption/decryption methods, etc. Moreover, political, religious and cultural sensitivities which have led to uniform application, if not more severe, of unparalleled content restrictions (see Chapter No. 8 for more detail) to broadcasting mediums, including internet, unheard of in any developed democracy.

iii. Before 2002, there were only two broadcasting organizations which operated TV channels, namely, those operated by Pakistan Television Company and Shalimar Broadcasting Company. Post-2002, the government opened the airwaves for private broadcasters, allowing private companies to run TV channels via satellite or cable. However, it did not permit use of airwaves or what is also known as terrestrial broadcasting. No one is allowed apart from government to air its channels using public airwaves that can be intercepted by citizens for viewership. Scholars have criticized this blatant limitation on and underutilization of the use of public airwaves. This is, logically, part of government's policy to restrict free speech and protect its monopoly over terrestrial broadcasting, as it has greatest breadth and coverage.[199] PEMRA has issued 89 licenses to satellite TV channels[200] and 6 mobile TV service, 20 landing rights, 141 commercial & 45 non-commercial FM radio, and numerous cable TV operator licenses at sub-District level so far.[201]

iv. In order to better grasp the legal and policy implications for

[199] Marco Mezzera and Safdar Sial, Media and Governance in Pakistan: A controversial yet essential relationship, (2010) IFP Democratisation and Transitional Justice Cluster. P. 21-22.
[200] List of Satellite TV License Issued by Pemra, PEMRA. Available at Url: <http://58.65.182.183/pemra/pemgov/wp-content/uploads/2015/09/list_of_licenses_issued_stv.pdf>
[201] PEMRA Website. URL: <http://www.pemra.gov.pk/>

regulation of the industry, it is very important to have an understanding of the structure of the industry and key areas for regulative intervention. Our main concerns would remain pluralism and diversity, which are globally recognized to be part of fundamental human right of access to information, and are cornerstones of a well-functioning, well-informed democracy.

Broadcasting: Definitional Approach

i. Broadcasting, globally is defined as being in the business of producing "interactive information content" (especially audio and video content) and channeling it via telecommunications services, both one and two-way.[202] This definition is accepted broadly in the developed world. In Pakistan, owing to evolving digital technologies, broadcasting remains tied to two basic platforms: radio and Television. This is primarily because Pakistan, being the only South Asian nation apart from Afghanistan, has not switched from analogue to digital system in the dissemination of broadcasting. (See Exhibit A). Therefore, the policy, regulative and competitive imperatives for the government would be limited to radio and television, and not to advance discussions for non-existent platforms and distribution systems a digital broadcasting regime has. Our main focus would remain on the legal frameworks for the regulation of licenses, content, complaint systems, competitiveness, distribution and economics of the broadcasting/cable/satellite networks.

Exhibit A. ***Developments in Broadcast Industry that have taken place in developed world before 2000:***

PAKISTAN	DEVELOPED DEMOCRACIES
Analogue	Digital
One-Way	Two-Way and interactive
Limited Bandwidth	Unlimited Bandwidth
Variety of broadband access paths (satellite, fibre optics)	Same
Mass Audience	Increasingly fragmented audience;

Source: Adapted from Biggar, Darryl R., Regulation and Competition Issues in Broadcasting in the Light of Convergence. Australian Competition and Consumer Commission. (1999)

[202] See, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law And Policy. 'Regulation and Competition Issues in Broadcasting in the Light of Convergence'. OECD. (1999).

ii. From the outset, it should be borne in mind that broadcast channels or networks are which are carried through (public) airwaves and are picked up by anyone with an antenna, such as "free-to-air TV." Same channels, networks or stations can be broadcasted via other mediums such as fiber optic cables, satellite, Internet, digital set-top boxes,[203] etc. Globally, broadcasters using public airways and cable/satellite/internet TV network providers using private resources are regulated differently by government in terms of content and programming, and both kinds of providers have different markets and business models.

iii. In Pakistan, the situation is quite different. Free-to-air broadcast TV network which uses terrestrial beams is entirely owned and run by government, called Pakistan Television Corporation (PTV); whereas, there are many radio stations run by commercial and non-commercial entities. Whereas, most of the channels/networks are privately owned and run through satellite or are uplinked. The latter are not transmitted directly to consumers, but rather via cable TV operators, who act as licensed distributors. (Hence, there is no market for pay-television in Pakistan yet.) The cable operators bundle all the channels together (whether operated through satellite or uplinked), including CD in-house channels distributed by itself,[204] and sell the bundle through subscriptions to the consumers, and charge a periodic fee in return, (exhibiting an upstream and downstream model of revenue).

iv. It is argued that 2002 electronic media liberalization did not change the face of public sector broadcasting, which remains monopolistic 'in the provision of terrestrial services'. Researchers have pointed

[203] PEMRA has published a consultative paper on the minimum technical requirements for digital set-top boxes in anticipation of switch to digital broadcasting in year 2016. See Consultation On Draft Minimum Technical Requirement And Specification For Digital Set-Top Box (Dvb-C), 2016. On 23rd November, 2015, PEMRA reportedly issued notification to all cable operators in Sindh to discontinue analog cable services, and require its subscribers to buy digital set-top boxes. Samir Yawar, 'PEMRA Orders Cable Operators in Sindh to Stop Analog TV Services Immediately', ProPakistani. 23-12-2015. Url: http://propakistani.pk/2015/12/23/pemra-orders-cable-operators-in-sindh-to-stop-analog-tv-services-immediately/ (Accessed on 16-03-2016)

[204] We would not venture to discuss regulation of CD in-house channels as The Media Commission appointed by the Supreme Court of Pakistan in its report has found that such channels are not being regulated strictly, although it is regulated through licensing (see section on licensing). To us, it constitutes a grey area for which we could not find separate rules, judicial or administrative examples of regulation. See Report of the Media Commission appointed by The Supreme Court of Pakistan, 2013, p. 79, 2nd Edition (2013), (Islamabad: Friedrich Ebert Stiftung).

out 'while cable and satellite channels were allowed entrance into the new media market, the Pakistani government was careful in keeping a tight control on the television programs being offered through terrestrial beams' as the 'federal government, did not want to miss out on the huge reservoir of viewers represented by the rural areas of Pakistan, where modern technologies were still a distant dream, especially in economic terms'.[205] Moreover, the rural market did not contract post-liberalization, thanks to cheaper technological goods and expansion of infrastructure to rural areas. It is also pointed out that granting cable and satellite transmissions allowed government to easily shut down services, 'as was proven in the November 2007 emergency situation'.[206] Government monopoly over terrestrial transmissions is an unprecedented deprivation of citizens' and communities' ability to exercise free speech.

Broadcasting Industry: Market Segments & Regulation Asymmetry

i. How does PEMRA treat different mediums of transmissions and broadcasting? It appears that in Pakistan broadcasting includes every kind of electronic media activity, regardless of its modus operandi. In PEMRA Ordinance 2002 as amended in 2007 by PEMRA Amendment Act, 2007 (ACT No. IIII of 2007), following Section 2(c) was inserted to give a broad and separate definition of 'broadcasting' industry:

> *"2(c) "broadcast media" means such media which originate and propagate broadcast and prerecorded signals by terrestrial means or through satellite for radio or television and includes teleporting, provision of access to broadcast signals by channel providers and such other forms of broadcast media as the Authority may, with the approval of the Federal*

[205] Marco Mezzera and Safdar Sial. (2010).. (2010)P. 21.
[206] Ibid.

Government, by notification in the Official Gazette, specify…"

ii. Under this definition, broadcasting is distinguished from (but clearly competes with) the dissemination of information that does not involve telecommunications services such as the publishing of a newspaper.[207] The definition does not attempt to distinguish between broadcasting and the variety of interactive media which make use of telecommunications services (such as the Internet, mobile-based information services, tablets, software applications, etc.). Going into such differentiations has its practical relevance in advanced countries, but perhaps not in Pakistan at this evolutionary stage.[208] Broadcasters in Pakistan still "push" content to the consumer; whereas, consumers in developed world increasingly "pull" content (through video-on-demand, online streaming, etc.). The latter offers public greater control and choice over broadcasters, hence incentive for more relaxed regulations. This is inconceivable in Pakistan at current stage (due to low internet penetration and absence of such products and services).

iii. The special rapporteurs on freedom of expression appointed by international organizations at the United Nations, Organization for Security and Co-operation in Europe, Organization of American States and AU stated in a Joint Declaration of 2003:

"Regulatory systems should take into account the fundamental differences between the print and broadcast sectors, as well as the Internet."

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[207] This may be a more satisfying definition than the conventional connotations associated with term broadcasting, as PEMRA's definition excludes any speech not coming in 'prerecorded signals' by technological means to be not broadcasting. It does away with conceptual problems identified by scholars. Biggar, p. 33, (ibid) argues:
"Under the definition, downloading a CD from a web site constitutes broadcasting, while purchasing the same CD from a record store does not. Reading a newspaper online would constitute broadcasting, while purchasing the same newspaper at a store would not. As these examples illustrate, content that may be distributed via telecommunications services (and thus would fall into the above definition) is often also disseminated by other means. In many contexts it will make more sense to speak of a broader industry which is involved in the production of all forms of audio and video content and its distribution by any feasible means, which we will refer to as the "multimedia/broadcasting industry"."

[208] As smart phone and internet penetration is still very low in Pakistan, let alone consumption of internet on multiple devices; moreover, such multi-platform services as video-on-demand, DTH, etc. are almost non-existent.

iv. Pakistani Courts have not developed jurisprudence for or against differentiated regulation of broadcasters.[209] However, Articles 19 and 19-A, on free speech and right to information, are applicable to broadcast transmissions and speech made on it.[210] Lack of differentiation between broadcasters using public resources and those employing private resources may not be as important in Pakistan's context as it is conventionally conceived, which results in asymmetrical regulatory regimes. Since Pakistan does not have any local or national programmers using public airways, which is a gross violation of constitutional right to free speech in itself, nonetheless overly strict rules for broadcasters may be inefficient and unconstitutional as there is abundance of alternate broadcasting mediums and hardly any private channel is received through interception of "public airways." Such asymmetrical treatment of broadcasters using public airwaves vis-à-vis private ones may in fact inherently be redundant and constitutionally unjustifiable.[211]

v. In the 1986 D.C. Circuit case, U.S. Federal Judge Robert Bork argued, "All economic goods are scarce… Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle leads to analytical confusion."[212] Although majority of legal jurists recognize the importance of treating different mediums according to its size, market, audience, reach and use of technology, to some scholars it may be a blessing in disguise that broadcasters are not treated differently when it comes to speech and license regulation in Pakistan, being technologically less advanced

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[209] United States' courts have for long justified more strict regulation of broadcasters using public airwaves under "pervasiveness" and "scarcity" arguments in landmark cases such as *NBC v. United States,* 319 U.S. 190, 226-27 (1943); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 375 (1969).

[210] See, Pakistan Broadcasting Association v. PEMRA. (PLD 2014 Sindh 630.)

[211] For detailed arguments why conventional asymmetrical broadcasting regulation is outdated, see Thierer, Adam D., Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age. CommLaw Conspectus - Journal of Communications Law and Policy, Vol. 15, pp. 431-482. The core argument of the paper hinges on age-old legal maxim, *Ratio est legis anima, mutata legis ratione mutatur et lex* (Translation: "Reason is the soul of the law; the reason of the law being changed, the law is also changed."

[212] Telecomm. Res. & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

than developed democracies, such as America. This regulatory posture, which needs critical reforms nonetheless in many areas, may pave the way for a more 'level playing field in a multi-platform' and (already) multi-channel media landscape that is to come in Pakistan, as technology evolves.

vi. This in no way prohibits government to put more obligations on 'significant market players'. Positive obligations are put in developed democracies on broadcasters and cable/satellite networks for enhancement of local, diverse and communal speech; advocates of free trade may argue that it may tantamount to taking private property and rights, however, plurality and free speech are prime, compelling government interests. Restrains on media ownership is another example of legitimate regulation to curb corporate influence on free speech as it limits audiences' right to receive information (we will discuss these issues in further sections).

The Pakistan Electronic Media Regulatory Authority (PEMRA)

i. Government of Pakistan, in 2002, established the Pakistan Electronic Media Regulatory Authority (PEMRA) under the PEMRA Ordinance of 2002. It was entrusted with a very wide mandate of regulating all kinds of electronic media under PEMRA Ordinance, 2002. Its main objectives include 'promotion of an independent and free media' for the development of democratic society; 'improving standards of information, education and entertainment'; enlarging choice of content, or what may be called pluralistic speech; 'improving access of people to mass media'; and 'ensuring accountability, transparency and good governance by optimizing the free flow of information'.[213]

Critics of PEMRA have stated that the authority remains under control and dependency of the government, and has not been able to effectively regulate pressing issues of media concentration, enforcement of its policies, lack of diversity of content, anti-free

[213] Muhammad Aftab Alam, Broadcast Regulation in Pakistan: The Need for an Enabling Regulatory

trade policies, competitive issues, free flow of speech (and its mediums) technological convergence, among others. As we will observe, there is strong empirical support for such criticisms. PEMRA lags behind independent and efficient regulatory authorities of developed democracies such as Canada and America.[214] It is often criticized to be a mere 'license issuing authority' in total control of Government.

Organizational Structure

i. Independence and autonomy
Since its inception, PEMRA was placed under the direct control of the Ministry of Information and Broadcasting (MoIB), but later this institutional structure was changed subject to criticism of media representatives that 'the authority could become yet another instrument in the hands of the government to safeguard the dominant position of its state broadcaster PTV'.[215] This institutional arrangement, however, was again reversed when it was once again put under indirect control of MoIB in 2007.

ii. Section 4 of the PEMRA Ordinance, 2002 gives Federal Government power to issue binding policy directives to PEMRA. Hence, in 2007 Government amended the Ordinance of 2002 giving PEMRA authority to ban 'printing or broadcasting of anything which defamed or brought into ridicule the head of state, or members of the armed forces, or executive, legislative or judicial organs of the state'.[216] In addition, the amendment gave PEMRA authority to 'draft a tough new "voluntary" Code of Conduct that would supersede at least three other similar Codes'. A third amendment enacted on 3rd November 2007 'notified at least seven new violations that were not part of the version of the law that existed before the state of emergency', and it carried enhanced punishments and penalties. Such amendments were in clear

[214] See Daithi Mac Sithigh, "It is hereby declared": The Quiet Reform of Canadian Broadcasting Law, Society of Legal Scholars, Annual Conference, 15-18 September 2008, University of East Anglia.
[215] Marco Mezzera, etc. (2010). Op. Cit. p. 21.
[216] A. Rehmat (2008). Murder and mayhem: The Worst Year Ever for Pakistani Media, p.5. Annual State of Pakistan Media Report. Islamabad. (2007–08). Url: http://www.internews.org.pk/mediareports/200708%20%20State%20of%20Media%20in%20Pakistan%20%20Annual%20Report.pdf. (Accessed on 12-03-2016)

violation of established norms or 'inner morality of law' which prohibits sudden and arbitrary changes in laws. Courts have not developed precedents against or struck down such amendments.

iii. No government officials on the Board? Appointments process protected against influence?
The main factors of a well-functioning media regulation include ensuring freedom, independence and pluralism of speech. It is not possible to support these goals if the regulatory authority is itself not independent from government control. Federal Secretary of Information is also a PEMRA board member under Section 6 of the PEMRA Ordinance, 2002. All of the twelve members are appointed by the President of Pakistan, out of which five 'shall be eminent citizens' including two women from all provinces 'on full time basis'. The Ordinance does not state the duration of appointment and grounds for firing the member, except that if the member, apart from 'ex oficio members',[217] absents for three consecutive meetings of the Authority. However, media researchers have reported how the 12-members are composed of ex-government officials:

> *"The 12-member authority was dominated by bureaucrats and ex-police officers – a phenomenon that had been partly changed after the assumption of office by the present government."*[218] *[Currently, there are no private members.]*

iv. The Court has been emphatic about the importance of 'position of Chairman PEMRA … to be filled by a person who fulfilled the exceptional and stringent requirements prescribed in the Ordinance … Appointment of Chairman had to be made through an open and transparent process to ensure that the appointee met the objective criteria specified in the Ordinance.'[219]

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[217] That is, secretaries of broadcasting, interior division, chairman Pakistan Telecommunication Authority, and chairman of Central Board of Revenue, Section 6(4).
[218] International Media Support, Between Radicalisation and Democratisation in an Unfolding Conflict: Media in Pakistan, p. 18. (2009)
[219] Hamid Mir v. Federation of Pakistan. PLD 2013 SC 244.

v. Courts have been stringent about procedural legal validity of the instruments created by PEMRA. In the case quoted above, Court declared PEMRA (Content) Regulations, 2012 to be of no legal consequence as it was issued when PEMRA did not have a Chairman appointed under given provisions of the Ordinance. It rejected the argument that the 'de facto doctrine incorporated Section 3(4)' would 'save the acts of purported Acting Chairman as said doctrine was limited to those public functionaries who acted bona fide and whose legal status had not been objected to'. Court went on to make a grandiose statement about the morality of procedural law and why Section 3(4) couldn't apply in contravention of Section 6:

> *"The statute cannot be read in a way which makes its most important and potent parts such as the provisions about the very composition of PEMRA redundant. Such an interpretation of the de facto doctrine verges on utter disregard for the rule of law, which is the foundation of our constitutional order. Resort to such loose and offhand reasoning will amount to an invocation of the doctrine of necessity which our constitutional courts no longer adhere to."*

vi. Court did not make any statement about the expansive powers given under the impugned instrument and its sweeping restrictions on speech (including manner of speech) of cable and satellite TV networks. Some of these inherently vague and extremely restrictive provisions include mandatory prohibition of "offensive or derogatory jokes, words, gestures, dialogues and subtitles are not broadcast or distributed"; "coverage of incidents of violence and crime shall not incite, glamorize or in any way promote violence or anti-social behavior"; "content shall maintain high standards of language and abusive language shall be strictly avoided in all programming categories specially in dramas and talk shows"; "gloomy, sensational, or alarming details not essential to factual reporting shall not be aired as a part of news-bulletin"; "news shall

not be aired in a manner that creates public panic." The said regulation, however, does not apply to publicly funded broadcasting of PTV or PBC. The procedural defect was later on corrected and regulations were adopted.

vii. PEMRA's subjugation to Federal Government was exposed in an important case.[220] It refused to grant license to the petitioner 'on account of non-clearance of security by Ministry of Interior on advice of security agencies'. The Court rejected PEMRA's submission to Interior ministry's jurisdiction holding that it was not duty bound by directives of the ministry. Court ruled applying well-established constitutional principles:

> *"Ministry of Interior had not given any reasons for refusing security clearance to petitioner. No material on record to show as to what threat, if any, was perceived to be likely to be caused by grant of such license. Every executive order must contain reasons therefor."*

PEMRA's Content Regulation

i. PEMRA[221] is often criticized for disproportionately penalizing the offenders in electronic media with imprisonment and/or huge monetary fines, under Section 33 of the PEMRA Ordinance, 2002, which holds:

"33. Offences and penalties. (1) Any [broadcast media or distribution service] operator or person who violates or abets the violations of the provisions of the Ordinance shall be guilty of an offence punishable with a fine which may extend to [ten][222] million rupees."

ii. Despite PEMRA's immense ability and authority to curtail free speech, on many momentous occasions the regulatory body has been used as a façade for government to punish speech of

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[220] PLD 2011 Karachi 494(a).
[221] Modification of *ultra vires,* i.e. outside the law.
[222] Substituted for the word "one" by the PEMRA (Amendment) Act, 2007 (Act No. II of 2007).

broadcasters. The case in point is Geo Network's allegations against head of Inter-Services Intelligence (ISI), the premier spy agency and arm of Pakistan Army, on the attempted murder of its TV anchor, Mr. Hamid Mir. Government institutions acted *ultra vires* of PEMRA's statutory provisions and issued directive to PEMRA based on 'advice' from ISI to suspend its license for 15 days and fine Geo for Rs. 10 million.[223] When Geo was finally allowed to re-broadcast, it remained banned in Cantonment areas and was given unfavourable positions in array of channels by private cable operators. Geo was sued under penal provisions of sedition and blasphemy laws which are not part of PEMRA's compendium of legislations at various forums. This unprecedented, mistreatment and arguably outright breach of constitutional rights of a single broadcaster was made possible by blatantly arbitrary, procedurally unfair and substantively unconstitutional victimization of State, before which PEMRA seemed hopeless. No corrective or any preventive measures have been adopted by PEMRA to avoid such state coercion on free speech right of broadcast media.

Executive Discretion & Restrictions on Speech Content

i. PEMRA enforces rules as well as regulates speech on case-by-case basis. Rules 'conserve public and private resources' and increase predictability; but are prone to 'permitting the harmful and incorrectly forbidding the beneficial',[224] as often is the case with PEMRA regulations.[225] Whereas, case-by-case analysis reduces miscarriage of justice, but is a thorn in the side of regulators as the Report commissioned by Supreme Court of Pakistan notes that one of the negative facet of news media is:

[223] Web Desk/Reuters, PEMRA suspends Geo TV's license for 15 days, imposes Rs10 million fine, The Express Tribune, Pakistan (2014). http://tribune.com.pk/story/718288/pemra-suspends-geo-tvs-license-for-15-days-imposes-rs10-million-fine/ (Accessed on 13-03-2016)

[224] Owen, Bruce M., Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules, p. 6. Law Review of Michigan State University-Detroit College of Law, Forthcoming.

[225] For instance, as noted above, PEMRA, an independent regulatory authority, can ban 'printing or broadcasting of anything which defamed or brought into ridicule the head of state, or members of the armed forces, or executive, legislative or judicial organs of the state'.

> *"Inability of PEMRA to enforce discipline due to excessive proliferation of channels (satellite channels plus CD in-house channels of each cable TV Distributor) and due to stay orders from the High Courts."* [226]

ii. In Pakistan, our research shows that there is lack of stare decisis and body of applicable judicial precedent covering all the broad powers given to PEMRA to regulate licenses and content. Perhaps, 'cases' and 'controversies' may have not reached the Court. Where it has, Courts have not ventured to give standards elaborating PEMRA's habitual vague and sweeping statutory expression.

iii. Very recently, PEMRA has delegated powers to shut down any channels instantly upon violating the code of conduct for media to its Chairman, Mr. Absar Alam.[227] Moreover, applying broad powers given under the legislation to restrict content, PEMRA took 'notice of exaggerated coverage of protests and stated that such attempts have created panic in society and can risk people's life and limb'. Finding the channels guilty of 'creating sensationalism through their analyses and tickers that could lead to fanning sectarianism, intolerance and deterioration of law and order situation', it implicated such analyses to 'destroy[ing] the National Action Plan at a time when Operation Zarb-e-Azb [was] going on'. PEMRA only issued warning at this instance.[228]

iv. Continuing in the tradition of repressive media laws, since Pakistan's inception, PEMRA has beenfurther delegated power to ban speech (through a program or advertisement) of broadcast media and distribution service operation under Section 27 of the Ordinance which 'is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance

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[226] Report of the Media Commission. (2013). Op. Cit. p. 79.
[227] Web Desk, PEMRA empowers its chief to shut down any channel, The News, (01-03-2016) Url: http://www.thenews.com.pk/print/102038-Pemra-empowers-its-chief-to-shut-down-any-channel/ (Accessed on 13-03-2016)
[228] Ibid.

of law and order or is likely to disturb public peace and tranquillity or endangers national security or is pornographic, obscene or vulgar or is offensive to the commonly accepted standards of decency…' Many of the restrictions, such as 'ideology of Pakistan' are inherently vague and are not properly elaborated by judiciary as well, when the courts had a chance to set limits to broad powers under the section.[229] It is prone to abuse by the unelected regulators. PEMRA, further, has power under Section 30 to unilaterally revoke or suspend the license of broadcast media or distribution service 'by an order in writing' if it fails to pay license, renewal, etc. fees or if it 'contravenes any provision of [the] Ordinance'.[230]

Licensing

i. Are rules fair, competitive and promote diversity, including by allocating licenses to all three types of broadcasters – public, commercial and community)?
PEMRA is vested with the authority of granting and regulating licenses of various kinds of electronic media, including, cable, free-to-air, Direct-to-home (DTH), satellite, etc. TV, radio broadcast, among others.[231] All of the licenses are granted through a bidding process with stringent eligibility criteria, which is publicly available and is notified in advance of bidding process. Every license contains terms and conditions that a broadcaster has to comply with. The terms, as we would appreciate, are often vague, paternalistic, and restrictive; and delegate powers excessively to the executive to regulate speech of broadcasters, in return affecting heavily freedom of speech of the masses who are audiences.

ii. Local private broadcasters, as the Report and Recommendation of the Media Commission appointed by Supreme Court of Pakistan 2013 noted, are overburdened with many barriers to entry due to the

[229] In Dr. Shahid Masood v. Federation of Pakistan (2010 SCMR 1849), Court held all the provisions of PEMRA to be legally binding on all the licensees and the sole reason for broadcasters right to transmit its programs without hindrance.
[230] High Court in Independent Newspapers Corporation (Pvt.) Ltd v. Pakistan Electronic Media Regulatory Authority (PLD 2014 Islamabad 7) criticized huge renewal fees of license, although it did not venture to strike down renewal clauses from the PEMRA legislations.
[231] Section 18 of the PEMRA Ordinance, 2002 lists down all the categories of licenses.

nature of the industry and by the government to exercise speech. The Report states:

> *"In contrast to the case of entry into publication for print media, the entry criteria into the electronic media sector are exacting and more expensive i.e. the need to meet the eligibility criteria specified by PEMRA, the costs of obtaining a license e.g. Rs. 5 million, the costs of equipment and satellite broadcast facilities, the relatively high cost of operating a news channel."*

iii. The Report also noted that PEMRA does not grant community broadcast media licenses, and held it to be impediment to plurality and indigenous to speech, as following:

> *"PEMRA should be directed to formulate a fair, transparent policy to issue licenses on a non-auction basis, without applying a commercial approach, for community-based electronic media. PEMRA should be directed to revise its discriminatory exclusion of NGOs registered as social welfare associations, societies, trusts, not-for-profit joint-stock companies from being eligible applicants for community based electronic media."*

iv. The policy imperative is to provide balanced, nuanced and pluralistic content to the end consumer, as these factors reflect democratic principles of openness and transparency. Pluralism is founded on the constitutional principle of access to information, which implies right to multiple sources of information. The regulatory restrictions on how industry enters and does business can have a direct effect on the profitability of incumbent broadcasters and the quality of the content produced and may also limit the "pluralism" in the media sector. Strict restrictions on the new entrants are usually balanced by further regulating the quantity and location of advertising to promote the overriding goal of

pluralism. This is a case of one regulatory intervention leads to another, i.e., restrictions on entry leading to regulations on advertisement and revenue sources. License requirements imposing quotas on certain kinds of programming have led to somewhat distortion of competition in advanced economies (which have long shifted to digital broadcasting). Uniform regulation across the platforms and distribution networks has to be achieved, although it needs to be an immediate concern of Pakistani regulators in the very short-run.

Types of Licenses

i. PEMRA, between 2002 and end-March 2016, had issued 89 satellite TV, 6 mobile TV service, 20 landing rights, 141 commercial & 45 non-commercial FM radio, and numerous cable TV operator licenses at sub-District level so far.[232] Each type of license has separate legislative instrument to regulate its bidding process and varying terms and conditions. There are no community licenses for TV in Pakistan.

Eligibility Criteria

i. Granting licenses is a lengthy process throughout the world.[233] Eligibility criteria of each type of license must differ, because of nature of medium, content, audience and technological requirements. Broadly speaking, it includes permission to use portion of radio frequency spectrum, when it comes to wireless communication. Satellite TV, uplinking and fibre optic cable networks do not use public resources, but are given, not of ownership or proprietary rights over anything, right to broadcast its content to the public.

ii. PEMRA has issued plethora of regulatory instruments detailing technical and legal requirements a company or licensee must fulfil to get the license. Primarily, it includes corporate registration with SECP, FBR, security clearance from Ministry of Interior, minimum

[232] PEMRA Website, Url: http://pemra.gov.pk (Accessed on 20-03-2016)
[233] See, United States Government Printing Office Broadcast License Terms. http://www.gpo.gov/fdsys/pkg/FR-1997-02-05/pdf/97-2755.pdf (Accessed on 13-03-2016).

capital requirements, ownership and control of Pakistani nationals, and other rules of other statutory bodies regulating corporate bodies. Technical requirements differ according to the type of broadcasting mediums, and are at par with international technical standards. Broadcasters' licenses also include obligations that are deferred for regulation in future, including positive and negative ones. A flat license fee has to be paid upfront along with annual renewal fees, and is scheduled in PEMRA Rules, 2009 for each kind of license.

Terms of License

i. The terms and conditions of license are covered under Section 20 of the PEMRA Ordinance, 2002. It puts burden on the licensee to ensure 'preservation of the sovereignty, security and integrity of Pakistan' and of 'national, cultural/social and religious values'. Licensee, who is almost always a private person, is positively obligated to give up speech rights to accommodate these interests of the State, even if he does not use public resources. It further requires licensee to give space to ten percent of the total duration to 'broadcast … programs in the public interest specified by the Federal Government or the Authority in the manner indicated by the Government or … the Authority'. Mandatory local programming on private networks is commonplace in developed democracies to restrict influence of media concentration and to preserve local cultures.[234] PEMRA Ordinance does not directly encourage local programming, rather gives government substantial stake in private property and speech rights of the broadcasters.[235] There are no ancillary criteria for public interest broadcasting which the Government or the Authority may have to follow to come up with public interest programming.

Judicial Interpretation

i. The Courts are not willing to allow executive discretion to

[234] See, Rowbottom, Jacob H., In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online (January 23, 2014). Public Law Forthcoming; Oxford Legal Studies Research Paper No. 10/2014.

[235] See, Pech, Laurent, Balancing Freedom of the Press with Competing Rights and Interests: A Comparative Perspective. FREEDOM OF EXPRESSION, Eoin O'Dell, ed., Ashgate, Forthcoming.

restrictively interpret licensing provisions under statute and burden the speech rights (and right not to exercise it) by the licensee. Terms and conditions of the license, it seems, are to be construed as liberally, although it is not completely clear whether the burden of proof always remains on the regulatory authority or the alleged violator of terms of the license. There is a dearth of case law brought before the higher and apex courts concerning broadcasting regulations, perhaps because the market is still in a formative phase. Few cases where broadcasting regulations have been judicially interpreted, Courts have applied ordinary principles of jurisprudence.

ii. In *Independent Newspapers Corporations (Pvt.) Ltd vs. PEMRA* [236], Islamabad High Court noted:

> *"It is also noteworthy that at least in the case of Messrs Independent Newspapers Corporation (Pvt.) Ltd. had obtained four Licenses in 2008 out of which they launched transmission of three channels while failing to start transmission of 'Geo English' only. Hence, even otherwise the reason of delay in grant of licenses causing increase in cost and causing force majeure, is simply untenable. There is no valid reason for failure to start transmission of Geo English in view of these facts. It appears that non-commencement of transmission of Geo English was purely a commercial decision on the part of the licensee and hence cannot be the basis of contravening the condition of the license."*

iii. The Court held the license not to be conferring any further obligations (and conversely, ownership or such rights) on the licensee in respect of exercising the permissions granted, rather viewed it to be a power-conferring tool to be exercised as per the

[236] PLD 2014 Islamabad 7

discretion of the user, and allowed its business decision (to disband the channel, based on lack of market viability of English news channel) to be beyond judicial or administrative scrutiny. (However, actus rea of inefficient, interruptive or poor transmission of services after the channel may become operational remains open to penalty under statutory provisions.)

iv. Courts have repeatedly applied ordinary principles of administrative law such as *procedural fairness, 'estoppel', 'equity', 'equality',*[237] etc. to statutory provisions governing licensing agreements. In another instance, it held that 'PEMRA was at liberty to regulate its affairs and unless such regulation was arbitrary, discriminatory or demonstrably irrelevant to the policy, it cannot be interfered with on the grounds of mere commercial expediency'.[238] Thereby, 'prescribing "duration of advertisement" during a program the Legislature or the Government, [does not] in any manner infringe[s] the right of private media companies guaranteed under Articles 18 & 19 of the Constitution, because said rights were not absolute rights but were subject to reasonable restrictions in accordance with the provisions of the Constitution itself or any other law made in such regard'.[239]

Geographical Segmentation

i. Courts have allowed geographical differentiation in licenses. There in Muhammad Ashraf v. PEMRA,[240] Court upheld segmentation of licenses between rural and urban areas where operation of cable TV was concerned. It held that the principle of 'fair competition' was not breached due to 'distinction between licensees of rural and urban areas' where the 'petitioner was granted license on payment of usual fee to operate in a rural area, whereas respondent was a licensee to operate in an urban area. Areas defined as rural areas should not be included in urban areas. Licensee who had been granted license to operate in an urban area must compete with the

[237] Ibid.
[238] Pakistan Broadcasters Association, et. al. v. PEMRA, et. al. (PLD 2014 Sindh 630).
[239] Ibid.
[240] 2011 YLR 1578.

licensee in urban areas. Similarly a licensee having license in rural area must compete with the licensee in rural area, otherwise distinction in category of license on the basis of areas would become meaningless'.

Tradability of Licenses

i. Section 30(1)(d) of the PEMRA Ordinance, 2002, limits transferability of license through transfer of ownership or control in the broadcast media company, as following:

> *"(d) where the licensee is a company, and its shareholders have transferred a majority of the shares in the issued or paid up capital of the company or if control of the company is otherwise transferred to persons not being the original shareholders of the company at the time of grant of license, without written permission of the Authority."*

Ownership Restrictions

i. PEMRA Ordinance, 2002 explicitly prohibits monopolistic behavior in media industry under Section 23, which states:

> ***"23. Exclusion of monopolies.-*** *(1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and operation of broadcast media or distribution service or in the supply to or purchase from, a national broadcaster of air time, programs or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.*
>
> *(2) In granting a license, the Authority shall ensure that open and fair competition is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that undue concentration of media ownership is not created in any*

city, town or area and the country as a whole ...”

ii. Following list gives the ownership limits on each type of broadcast media license imposed by PEMRA:

- *Cable TV.* PEMRA Cable TV (Operations) Regulations, 2002, does not cap ownership of cable TV channels/networks.
- *Satellite TV.* A person owning more than one media enterprise can get licenses to a total of four Satellite TV.[241]
- *Distribution services.* The proviso of Section 5(2) of PEMRA (Distribution Services) Regulations, 2011 caps ownership of licensee or any of its directors or partners at four distribution service licenses, providing ‘further that except in the case of landing rights permission, a person shall not be granted more than one distribution service license in the same area of operation’.
- *TV Broadcast Station Operations.* Not more than four TV licenses to be owned by licensee, directors, or partners; no more than one TV license in the same area of operation[242]; ‘owning, controlling or operating broadcast media or landing rights shall not be granted any other distribution service license and *vice versa’*.
- *Landing rights.* A person owning more than one media enterprise can get licenses to a total of two landing rights.[243]
- *Radio (commercial/non-commercial).* A person owning more than one media enterprise can get licenses to a total of four FM Radio licenses landing rights.[244]

iii. PEMRA Rules, 2009 put a cap on ownership of cross-platforms under Rule 13, as following:

“13. Media ownership concentration and exclusion of monopolies.- *(1) To ensure that fair competition is facilitated, media diversity and plurality are promoted*

[241] Rule 13(1), PEMRA Rules, 2009.
[242] Section 5, PEMRA (TV Broadcast Station Operations) Regulations 2012.
[243] Rule 13(1), PEMRA Rules, 2009.
[244] Rule 13(1), PEMRA Rules, 2009.

in the society and undue concentration of media ownership is not created. Maximum number of licenses that may be issued to a person or any of its directors or partners where such person is a company or firm, who is directly or indirectly, controlling, owning or operating more than one media enterprise, shall not exceed a total of four satellite TV, four FM Radio licenses and two landing rights permissions."

iv. The Rules also prohibit cross-managerial control of associated undertakings, requiring separate managerial staff and accounts/book keeping. Apart from the overarching provision quoted above, PEMRA legislated PEMRA (Media Ownership & Control) Regulations, 2002[245] which provide some concrete measures and broad anti-trust principles for merger and acquisitions guidelines for media outlets.[246] Competition Act would be applicable to transactions between media houses, as well.[247]

v. PEMRA has a rather exhaustive list of provisions barring dominant forms of funding, control or ownership of broadcast media by foreign entities.[248] The Report commissioned by Supreme Court of Pakistan recommended opening of foreign funding, subject to restrictions, as following:

"PEMRA should be directed not to disqualify applicants on the basis that they are the recipients of funding support from multi-lateral institutions such as United Nations Agencies, regional organizations such as European Union or friendly foreign countries. Safeguards can be enforced to prevent community-based

[245] There is dearth of judicial precedent on the said regulations that could further guide on how to regulate concentration (including geographical, content and viewpoint) of speech among few owners and protection consumers against oligopolistic products in Pakistan, statutory or judicial precedent. In fact, we have not been able to identify a single case involving the said regulations or any obiter on risks of cross-media ownerships and any directions to address anti-trust issues in media industry.

[246] Section 16 of the PEMRA Rules 2009 prohibits 'merger, amalgamation or transfer of shares … without prior approval of the Authority'.

[247] For instance, in United States, there are Department of Justice/Federal Trade Commission's Merger Guidelines are widely applied to media industry.

[248] See Section 25 of the PEMRA Ordinance, 2002; Rule 17 of the PEMRA Rules, 2009; Regulation 17 of the PEMRA Cable Television (Opp.) Regulations, 2002, etc.

electronic media from being used to project content that is violation of the laws of Pakistan and PEMRA's Regulations & Rules to prevent such media from being exploited for covert objectives or being misused by locally-based extremists or hate groups." [249]

Non-conducive Environment for FDI

i. We noted in the beginning that one reason for lack of advancement towards multi-platform and multi-channels media may be hostile to foreign media ownership and management laws in Pakistan. The guidelines for Landing Rights enforced by PEMRA limit severely ability for foreign companies and media houses to provide innovative services in Pakistan.

ii. PEMRA Ordinance, 2002 severely limits participation of global media outlets and persons in Pakistani broadcast media market. Section 25 of the Ordinance declares following personsineligible:

> ***"25.Certain persons not be granted license.-*** *A license shall not be granted to—*
> *(a)a person who is not a citizen of Pakistan or resident in Pakistan;*
> *(b)a foreign company organized under the laws of any foreign government;*
> *(c)a company the majority of whose shares are owned or controlled by foreign nationals or companies whose management or control is vested in foreign nationals or companies; or*
> *(d)any person funded or sponsored by a foreign government or organization."*

iii. The rationale for limiting foreign involvement in media is to ensure that the broadcasting space is controlled by local voices. The alternative is that local voices may be drowned out by foreign ones, to the detriment of the audiences' right to information

Switch To Digital: Regulatory Framework

i. Conventionally, most of the broadcasting was based on radio, and

[249] The Report. (2013). Op. Cit. P. 198.

relied heavily on advertising for revenue generation. Economic theory has showed that where there is a limited amount of spectrum available, competition between broadcasters that rely entirely on advertiser support will not necessarily achieve public objectives of quality, diversity and efficiency.[250] Such arguments have been used to justify a significant amount of regulation of traditional free-to-air broadcasting including strict licensing conditions, rules regarding content and subsidies to "public service" broadcasters.

ii. The absence of digital transmissions has led to impediments in broadcasters' right to speech and audience's right to receive information. Cable operators, being fragmented and middle men as they are, have become pawns in the hands of interest groups, requiring high-end judicial intervention. In Dr. Shahid Masood v. Federation of Pakistan, et. al.,[251] Supreme Court ruled against cable operators who were 'blocking/obstructing transmission of petitioners [satellite TV network] and consequent denial of distribution service to the channels in question and to the viewers who were paying the operators for the services'. Court not only recognized speech rights of broadcasters but right to receive of audience as well. It further went on to rule:

> *"PEMRA must realize that license issued by it to a TV Cable operator is a certification by it for all concerned that such an operator had committed and consequently stood obligated to offer un-disturbed distribution service to broadcasters as also to viewers; it is on the basis of such certification by PEMRA that on the one hand, the broadcasters entrust the transmission of their broadcasts to the operators and on the other, the hundreds and thousands of viewers/subscribers pay their hard-earned money to the operators to receive such service."*

[250] This finding is based upon survey of key EU states as documented in Biggar, Darryl R. (1999) Op. Cit.
[251] 2010 SCMR 1849.

iii. Digital broadcasting is a solution to middle-man corruption. Pakistan is one of the only two countries in South Asia who haven't declared the status of digital switchover mandated under the International Telecommunication Union. PEMRA has declared September 30, 2016 to be the deadline for complete transition from analogue to digital broadcasting 'to ensure the maximum facilitation and protection of subscribers' rights' and has finalized the minimum standards specifications for Digital cable TV set top boxes. The authority has drafted the technical standards specifications of digital set top boxes in line with international practices to safeguard the legitimate objective such as quality of service uninterrupted operation of the equipment safety and competitiveness. The set top box shall be compatible and ensure compliance with the minimum technical standards as prescribed by the authority.

iv. PEMRA has made obligated all cable operators and equipment providers to meet certain performance and audio-video decoding requirements equipment to ensure conformity of electronic program guide and logical channel numbering, etc. The draft of standards is to be approved by the Authority in its upcoming meeting on March 30th and shall be made available on its website. It is also reported that PEMRA is vying 'federal government, Federal Board of Revenue (FBR) and provincial governments to facilitate cable TV digitalisation by offering tax holidays and exemptions on import of digitalisation equipment thus facilitating cable operators in meeting digitalisation deadline of September 30, 2016'.[252]

[252] We've drawn heavily for this section on following news report: Web Desk. PEMRA finalises standards for digital cable TV set top boxes. The News International (23-03-2016). Url: http://www.thenews.com.pk/print/107400-Pemra-finalises-standards-for-digital-cable-TV-set-top-boxes/ (Accessed on 23-03-2016)

Need For Media-Specific Competition Laws

Structure and Economics of the Broadcast Media Industry[253]

i. Broadcasting is an integral part of wider media industry, and competes in it. It is typified by economies of scale with huge fixed costs and low marginal cost of production. It takes enormous amount of investment to obtain licenses, install infrastructure and produce content.[254] But once content has been created, be it a drama series, a news segment, etc., it takes almost nothing to get the same content to another consumer – hence the low marginal costs. Moreover, broadcasting industry in Pakistan is protected with tacit intellectual property (IP) rights. The more the IP law regime strengthens, the more this industry will be granted monopoly-like rights over the content. (This is also evident in software, pharmaceutical, banking, cement, food and other kinds of companies with economies of scale.)

ii. Broadcasting is not about providing one-way communication and serving a single sector. It is also a platform, apart from dissemination of information critical for functioning of democracy and flourishing of cultural and national identity, which caters to the demands of consumers who want to have access to information and interactive digital services, and of commercial and non-commercial entities to want to purchase access to the eyeballs of media consumers. Practically, this is no different from newspapers as a platform (and requires inspiration from century old laws regulating newsprint, raw materials and other structural aspect of newspaper as part of media industry), but only in that it involves use of telecommunication services. Telecommunication services, as is obvious, cater to very broad sectors than broadcasting. However, in production and dissemination of the latter, it may involve radio waves, fixed-wire connection, which may be uni- or

[253] This section does not directly deal with legal framework in Pakistan, but is important to understand media industry holistically.
[254] PEMRA has detailed its licensing fee structure in Pakistan Electronic Media Regulatory Authority Rules, 2009, for landing rights, in-house channels, satellite TV, etc.

two-dimensional, high or low bandwidth and digital or analogue. Pakistani broadcasting industry has not tended towards high bandwidth, digital services as of yet.

Regulating the Production Chain: Competition Issues

i. Competition experts have divided broadcasting sector into a number of separate "stages of production", from program production, through program packaging, wholesale distribution, retail distribution and customer terminal equipment. (See Exhibit B.) Many of the regulatory and competition issues that arise in broadcasting relate to preventing the creation or abuse of a dominant position in one of these stages of production. It may attempt to restrict competition either at the same level or in an upstream or downstream market, through exclusive vertical arrangements.[255] The difficulty for competition enforcers and policy makers is to distinguish legitimate efficiency enhancing vertical arrangements from those arrangements which are potentially anticompetitive. There are efficiency enhancing reasons why a content provider may only wish to deal with one infrastructure provider in each market. There are also efficiency reasons why an infrastructure provider may wish to only accept one source of content of a given type.

ii. In particular, significant competition concerns surround retail distribution of broadcasting content, which in Pakistan remain to be cable operators. There are relatively few different technological alternatives for the retail distribution of broadcast signals. Therefore, Pakistani regulators need not concern themselves with advanced regulation of further stages of productions beyond content generation and production.

[255] See Sluijs, Jasper P., From Competition to Freedom of Expression: Introducing Art. 10 ECHR in the European Network Neutrality Debate (September 15, 2011). Human Rights Law Review 12(3) 2012; TILEC Discussion Paper No. 2011-040.

Exhibit B. "The Multimedia Value Chain"

Stage	Description	Example
Content origination	Production of multimedia content for each of the major distribution methods	Hollywood studios; Web publishers; Television
Service provision	Translation of content into a form that can be decoded by terminal equipment, handling inter activity requirements and customer accounting	Internet service providers such as AOL; local cable television providers; satellite television providers
Infrastructure provision	Communication to and from service provider, at both wholesale and retail level	PSTN operators; cable television providers; satellite broadcasters; Specialist "backbone" broadcasting carriers
Terminal vending	Customer-site equipment translating signals into audio/video signals, controlling access and permitting interactivity	Television, computer and modem manufacturers; Set-topbox manufacturers; Satellite receiving equipment providers
Source: Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy. 'Regulation and Competition Issues in Broadcasting in the Light of Convergence', p. 34. OECD. (1999).		

iii. It is well established that there can be four scenarios of anti-competitive behaviour and abuse of dominant position, which can lead to regulatory capture, in the 'value chain'. OECD's study of competition issues in 1999 in major EU states postulated the risk scenarios to be:

> *"cases where a dominant content provider refuses to deal with a competing downstream infrastructure provider; or where a dominant content provider insists that a downstream infrastructure provider refuses to deal with a competing content provider; or where a dominant infrastructure provider insists that a content provider refuses to deal with a competing infrastructure provider; or where a dominant infrastructure provider refuses to deal with a competing content provider."* [256]

[256] Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy. 'Regulation and Competition Issues in Broadcasting in the Light of Convergence', p. 14. OECD. (1999).

Key Indicator of Monopoly over Market Share: Timeliness

i. Therefore, at the center of broadcasting remains telecommunications. Such dissemination of information, however, remains different in key ways from that distributed via other means. Broadcasting via television, radio or internet (live-streaming option) has the unparalleled advantage of what is called "timeliness." More strict regulation by PEMRA may be justified on this ground.

ii. Timeliness gives huge advantage to broadcasting and its market share and power over other means of communication, because it has hardly any alternatives or substitutes. Something that can only be watched enjoyed or valued when shown live – such as live sporting events, political or security events – has no real substitute. Given the volatile political situation, ecstatic following of sports and huge social and cultural demand for serials and entertainment programs, Television, as king of broadcasting, is here to stay, if not adapt to digital platforms in near future, in Pakistan. Timeliness itself is a unique selling point of broadcasting. This is reflected in the willingness of broadcasters to invest and pay for content and its generation, and also the value that consumers' place on the content, globally. With switch to digital broadcasting in Pakistan, the content producers would be able to reap greater financial reward, and can diversify their revenue away from advertisements through subscription fees.

Recommendations

Problem: 5a. PEMRA lacks the independence required under international law of bodies which regulate the media in terms of both its members and its organisational structure.

Solution: 5a. The structure and membership of PEMRA should be substantially revised so that it is structurally and functionally independent of the executive as well as of commercial media outlets (with representation of key stakeholders and professionals, and including gender and minority group representation), including, among other things, by putting it under parliamentary oversight.

Stakeholders: 5a. PEMRA, federal government, representative associations of media owners and workers, media support groups and civil society

Problem: 5b. The reservation of the terrestrial space exclusively for the State broadcasters and the failure to take advantage of the opportunities offered by the digital transition.

Solution: 5b. The process of switching over to digital broadcasting should be continued with the support of an appropriate legal and policy environment, and the airwaves should be opened up to private broadcasters.

Stakeholders: 5b. PEMRA, federal government and media support groups

Problem: 5c. Excessive restrictions on the content of what may be broadcast, along with unduly heavy-handed application of these rules.

Solution: 5c. The rules on content should be reviewed and amended so as to bring them into line with international standards in this area, including by removing vague and unduly intrusive restrictions. The possibility of a co-regulatory system for content-related complaints should be explored.

Stakeholders: 5c. PEMRA, federal government, representative associations of media owners and workers, civil society and media support groups

Problem: 5d. The rules fail to provide adequate protection against possible abuses of dominant positions of media owners in broadcasting.

Solution: 5d. Clear and specific anti-competition or undue concentration of media ownership rules should be developed, including in relation to foreign ownership of the media.

Stakeholders: 5d. Competition Commission, PEMRA, federal government, representative associations of media owners and workers and media support groups

Problem: 5e. Undue self-allocated government quota on air time and lack of adequate community access to air time.

Solution: 5e. The power of the government to provide for the allocation of 10% of the total air time of networks should be done away with and instead this time should be allocated to community interest groups representing marginalised segments of society (such as children, women, minorities, persons with disabilities, etc.).

Stakeholders: 5e. Federal government, PEMRA, representative associations of broadcasters and media workers, consumer groups, civil society and media support groups

Problem: 5f. An absence of appropriate rules to promote media diversity, including the licensing of community broadcasting, leading to a lack of community-owned broadcast media.

Solution: 5f. The rules regarding licensing should be reviewed to ensure that appropriate safeguards are included to promote media diversity. As part of this, the rules should provide for a system for licensing community broadcasters, in particular community radios, and to ensure an equitable reservation of frequency for this broadcasting sector.

Stakeholders: 5f. Federal government, PEMRA, civil society, representative associations of special interest community groups and media support groups

CHAPTER 6

PUBLIC SECTOR BROADCASTING

PUBLIC SECTOR BROADCASTING

Principles of public service broadcasting, Pakistan's public service broadcasters (PTV, PBC, APP) – independence, mandate, public funding, transparency

Introduction

i. In broadest terms, public service broadcasting (henceforth referred to as 'PSB') refers to broadcasting (see Chapter No. 5 for detail) 'made for, financed by and controlled by the public'.[257] PSB can provide essential information and entertainment services to the public, while in many cases simultaneously professing and patronizing arts, culture and heritage. The requirements for its operations, programming and governance can be stringent and often balanced against competing interests. Not all countries can have similar kinds of laws, regulatory mechanisms and operational strategies for a PSB, as it depends a lot on political and governmental norms.

ii. Pakistan's government exercises excessive control over the administration and funding of the national broadcasters. Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance, 2002 defines national broadcaster under Section 2(p) as '"national broadcaster" means the Pakistan Broadcasting Corporation, the Pakistan Television Corporation and the Shalimar Recording and Broadcasting Company'. It is all provided under the law and has been upheld by the Courts as such. Although the national broadcasters perform essential PSB functions, however it also undermines its operations and independence by giving too much control to ruling government. Six key aspects of PSB organizations, recognized by leading scholars, include:

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[257] Dr Werner Rumphorst (1999), *Model Public Service Broadcasting Law,* International Telecommunication Union.

"a. general geographical availability;
b. concern for national identity and culture;
c. independence from both the State and commercial interests;
d. impartiality of programs;
e. range and variety of programs; and
f. substantial financing by a general charge on users."[258]

iii. Pakistan Broadcasting Corporation (henceforth referred to as 'PBC'), which operates radio services, and Pakistan Television Corporation (henceforth simply referred to as 'PTV'), which operates as the name suggests televisions services, cover a huge part of terrestrial area, and offer services in various languages and areas, which commercial broadcasters do not do generally in Pakistan. However, the impartiality of programming and the independence of these organizations is manifestly questionable and compromised due to the legal regime and existing political norms. Even the broadcasting revolution post-2002 has not brought about the necessary restructuring of PSB organizations, and it fails to meet international standards for national, or better 'public', broadcasters.

iv. Hence, we will first briefly discuss broad principles of regulating PSBs and its impact on free speech.

Principles of Public Service Broadcasting

i. There are some broad principles and factors that affect performance of a PSB organization, which the law and government must define well, ensure and protect. Failure of PSB organizations as public interest entities lies in the violation of such established principles, which we will see that Pakistan's national broadcasters often fail to ensure and follow.

Free Speech and Right to Information

i. PSB organizations can provide impartial news, information,

[258] P. 52. Eric Barendt (1995), *Broadcasting Law: A Comparative Survey* (Oxford, Clarendon Press), quoted in 'Public Service Broadcasting: A Comparative Legal Survey', by Toby Mendel.

entertainment and education programming to the population without any impact of commercial considerations that might distort viewership/listenership. It not only fulfills the role of government in providing access to information ensuring pluralism of voices, but can also preserve culture, arts and heritage of local areas and at the same time integrating diverse elements into mainstream national identity.

ii. Although we have touched upon the implications for free speech that broadcasting services have, and have noted how government agencies in Pakistan fulfil (or fail to fulfil) in the preceding chapters, we will still reiterate the international standards for the protection and guarantee of free speech a PSB organization must fulfil.

iii. A PSB must ensure neutrality and impartiality towards various segments of the society, including political parties and voices, because freedom of thought, opinion, information and speech are protected under international law and the constitution. Because PSBs, as in the case of Pakistan, are directly funded and controlled by the state, it has greater duty to protect these constitutional rights. It is obvious that Article 19A [relating to right to access to information] of the Constitution of Pakistan, 1973, is also applicable to PSBs in Pakistan, as they are in a unique position to fulfill these obligations.[259]

Coverage of PSB Services

i. PSB services should include the entire population of the country in terms of technical coverage, which means that every household in the area should be able to receive the programming. It should be available to the public on same footing as other 'universal services' such as transport, water, gas, electricity, etc. Moreover, it should also aim to be available to all segments of the society regardless of income, social or geographical background, preferably according to the local tastes and requirements. Only in this way, PSB

[259] Considering also the monopoly national broadcasters have enjoyed and still do over terrestrial broadcasting.

organizations can fulfill their mandate of integrating whole population at national level.

ii. Dr. Werner succinctly sums up the beneficiaries of PSB organizations:

> *"If, positively expressed, public service broadcasting is made for the public, for the entire population, it follows, negatively expressed, that it is not made for the government, parliament, or president, for a political party or a church or for any other (private) interest group or for shareholders. It must be independent of all of these, serving "only" the interests of the population, of people as citizens rather than as consumers."*[260]

Risks of being Government's Mouthpiece

i. Technological developments and policy of PTV to toe government position and act as its mouthpiece has led to diminished consumption of PSB by Pakistanis. It has been recognized that this leads to a downward spiral trend for a PSB's performance, as it leads to fewer viewership, and hence diminished revenues.[261]

ii. If a PSB cannot be neutral towards the content and viewpoint of the speech, it fails to protect constitutional guarantees of free speech. Part of the reason for such a situation lies in its independence. Under international and Pakistan's own jurisdiction it is recognized that government cannot use a PSB to perpetrate a specific viewpoint, be it political, sectarian, religious, etc.

Government Control of PSBs

i. Ideally, even if a PSB organization is funded by the government, it should have no say or control over the internal management and its board of directors. The board should be directly answerable to a parliamentary oversight committee, or such oversight, for how it

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[260] Dr. Werner Rumphorst. Op. Cit. P. 3.

[261] P. 4, Tobey Mendel. Op. Cit. He further notes, "It is perhaps ironic that in these circumstances, declining viewing statistics mean that government control no longer delivers the desired result, so that ultimately, even government support for publicly-funded broadcasters wanes."

used the government funding. The government may have control over the hiring of directors, but not in the management of the organization. The rules and process for hiring and firing of such public fiduciaries should be as open, clear and public as possible, with opportunities for directors or nominees to contest the decisions of the government, to ensure that government does not act in a unilateral and arbitrary manner.

ii. Nonetheless, it is nearly impossible to achieve such a kind of freedom from interference of government in a country like Pakistan, where regulations are always strict, and rarely relaxed when government's funding or infrastructure is involved. There have been suggestions for outsourcing PSB functions by merely granting funding to independent programmers. Such arrangements can be successful.

Public Control & Accountability

i. Public should exercise some degree of control over the PSBs, and should be able to hold it accountable for its mandate. This is usually made possible through independent auditing and reporting of the activities of the PSBs. Moreover, a robust, independent council, comprising of non-governmental personnel, should be established to advise the management, without making its recommendations binding. A council of complaints should also be instituted to hear complaints of citizens and penalize the organization for non-compliance with the law.

Funding

i. The most contentious and complicated issue in the operations of PSBs is securing its funding without compromising its independence and its editorial freedom from government. Most of the PSBs around the world continue to be funded primarily by the state. Because PSBs are such an important asset in which governments hugely invest, relinquishing its control does not come as a natural reaction. It requires sophisticated corporate governance structure and diverse range of sources of funding to ensure a degree of independence from government.

ii. PSBs are usually not supposed to sponsor their news and critical information segments, where advertisement and sponsorship revenues for other programs are seen as legitimate. Apart from these sources, license is a source of funding that can contribute substantially to the overall revenue of the PSB. The BBC is an example of being funded wholly by license fee. It can be charged indirectly through electricity bills [as is the case in Pakistan], thereby reducing costs of procuring fees. Arbitrary and unilateral funding by the government poses a grave threat to the efficacy of a PSB.

Air-time for Third-parties

i. A PSB, being an impartial disseminator of information, should accommodate all kinds of voices. Since it is funded by the government, it has an obligation to serve marginalized and underserved voices. PSB should provide space to ensure coverage of government pronouncements and activities, and should grant political parties an appropriate amount of space for campaigning purposes only. It should also grant equal opportunity and space to diverse religious and sectarian voices.

Regulatory Imperatives

i. Pakistan has not yet digitalized its broadcasting sector – although an original deadline of December 2015 has been missed and a renewed deadline of September 2016 has been given – nor has the industry moved towards 'personalized and interactive scheduling' of media services to consumers/citizens.

ii. Following framework (see **Table 1**) informs media experts and regulators about how to approach the differentials between commercial and PSB services:

Table 1. 'The scope of regulatory considerations regarding the viewing experience'

Commercial Domain	Viewing Experience	Public Service Domain
Active viewing experience (PPV, satellite, mobile, non-linear)	Personalized &interactive scheduling (non-existent in Pakistan)	Active viewing experience (free to air, wide range of PSB programming, subscription-based, non-linear)
CONSUMER		CITIZENS
Passive viewing	Reliance on 'linear scheduling' (as it exists in Pakistan)	Passive viewing
Individualistic information as a commodity		Communal information seen as part of public sphere and cultural heritage

Adapted from: P. 8, Harrison, J., & Woods, L. (2007). European Broadcasting Law and Policy. Cambridge: Cambridge University Press.

Pakistan's public service broadcasters

Broad Rules for PSBs in Pakistan

i. There are three PSB organizations that fall under the definition of 'national broadcast': Pakistan Broadcasting Corporation (PBC), Pakistan Television (PTV) Corporation and Shalimar Recording and Broadcasting Company (SRBC), the latter is owned primarily by PTV and PBC. Only PBC has its own separate statute that governs its management and functions; whereas, PTV and SRBC are incorporated under the Companies Ordinance, 1984, owned and controlled by the government.

ii. With the liberalization of broadcasting industry in 2002, the only change that was brought about in the law was to exclude monopoly over broadcasting medium, though not terrestrial medium for its propagation. Section 23of the PEMRA Ordinance, 2002 states:

> ***"23. Exclusion of monopolies.-*** *(1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and*

operation of broadcast or CTV stations or in the supply to or purchase from, a national broadcaster of air time, programs or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.

(2) In granting a license, the Authority shall ensure that, as far as possible, open and fair competition is facilitated in the operation of more than one channel in any given unit of area or subject and that undue concentration of media ownership is not created in any city, town or area and the country as a whole by virtue of the applicant for a broadcast or CTV operation license already owning or operating, as sole or joint shareholder of any other broadcast or CTV station, printed newspaper or magazine."

iii. This creates not only a broad presumption in law against anti-competitive treatment of private broadcasters, but also obligates government to ensure competition for plurality and diversity of voices. There are no other separate laws, apart from those discussed in preceding chapters, for the operations and functions of PSBs in Pakistan.

iv. PTV and SRBC are subjected to ordinary rules which govern private broadcasters. Control over the administration and content by the national broadcasters has been affirmed by the Courts. However, PTV is obligated to give space to various speakers with different viewpoint, regardless of their political affiliations. Representative of such judgments is the case of Muhammad Aslam Saleemi vs. Pakistan Television Corporation and another,[262] in which court ruled on the vires of government control over PTV (and PBC) as well plurality of viewpoints of speech. The Court

[262] PLD (Pakistan Law Decisions) 1977 Lahore 852.

started out by noting the statutory status of national broadcasters:

> *Pakistan Broadcasting Corporation is clearly a Statutory Corporation, which is fully controlled by the Government. Similarly, although the Pakistan Television Corporation is incorporated as a Limited Company under the Companies Act, 1913,*[263] *yet the Government has the controlling shares in it from its very inception and it is fully controlled and run by it. In support of the fact that the two Corporations are controlled by the Government it may be mentioned that no Radio or TV station can be installed without the prior permission of the Government as required by section 3 of the Wireless Telegraphy Act, 1933, it is the Government which appoints the General Manager or the Managing Director, respectively, of these two Corporations and their salaries are paid from public exchequer.*

v. The Court went on to affirm the exclusive power of the government to make rules for the PSBs, which ideally should be left to the management. The Court also upheld the exclusive control of government over its financing under the statute and did not call for more diverse sources of revenues for its independence. The definition of 'public service', to the Court lies in the fact that PTV and PBC fall under the 'Federal Legislative List' which provides for the funding of these organizations. Government under Article 253(1) of the Constitution has the power to 'take over and run any, such Corporations. The respondent-Corporations are clearly, "public services"'. Hence, 'Article 159 of the Constitution itself in various respects mentioned therein bestows certain powers on the Federal Government in the matter of broadcasting and telecasting and is in a way an indication of the fact that broadcasting and telecasting is rather under the sole control of that Government'.

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[263] Now governed by Companies Ordinance, 1984.

vi. Court further held that PBC and PTV are 'under the sovereign and exclusive power and function of the Federal Government i.e., the State and the Pakistan Television Corporation is only an agent of the itself performing these functions in the form of getting itself incorporated along with other shareholders in the form of a Corporation. In other words, the functions entrusted to or performed by the Pakistan Television Corporation are functions of the State involving exercise of some sovereign and public power'.

vii. Importantly, Court recognized that PTV and PBC should:

> *"Perform their functions impartially and with balance while broadcasting and telecasting their features, programs and news etc. about elections especially when, these two Corporations are performing their functions in connection with the affairs of the Federation i.e. the State whose duty, i.e. the State's duty) it is, enshrined in Article 3 of the Constitution to ensure the elimination of all forms of exploitation " and if utilisation of broadcast or telecast purports to its exploitation solely in favour of one political party to the total or material exclusion of other parties…"*

Pakistan Broadcasting Corporation (PBC)

i. PBC continues to enjoy its dominant position in the radio industry, despite liberalization of broadcasting industry in 2002. As a 2009 study on media and governance noted:

> *"According to the PBC's own figures, its 69 medium (33), short wave (7) and FM (29) stations cover approximately 80 percent of Pakistan's territory, or 96.5 percent of the population, and it has a regular audience of 95.5 million listeners."*[264]

[264] See p. 23, Marco Mezzera and Safdar Sial (2010), *Mediaand Governance in Pakistan: A controversial yet essential relationship.* Initiative for Peacebuilding. Also see http://www.radio.gov.pk/aboutus.htm and http://www.radio.gov.pk/new/site/images/pbc_st.jpg.

ii. Its dominant position in the rural areas is explained by the 'low technological threshold represented by radio in general, when compared to more expensive, sophisticated and electricity-dependent communication systems such as internet or television' and first move advantage.[265] PBC enjoys advantage also because of its localized content and diversity of its programming, hallmark of any PSB service, as it offers broadcasts in 20 local languages from 33 different cities, apart from the national language, i.e. Urdu.

Governance Structure

i. As noted earlier, PBC is governed by a separate statute, namely, Pakistan Broadcasting Corporation Act 1973. It establishes a board of directors that oversees the management.

ii. Ideally, the board, comprising of non-political and non-governmental personnel, should be answerable to the public, ideally through parliament, but should be independent of any governmental and political affiliations. However, this is not the situation, as the board is dominated by government officials, as following:

> *"4. Board.-(1) The general direction and the administration of Corporation shall vest in a Board, to be constituted in accordance with the provisions of sub-section (2) [which states]: The Board shall consist of the following:-*
> *(i) Secretary to the Government of Pakistan, Ministry of Information and Media Development. Chairman (ii to v) One eminent person each from the four provinces relating to media and management to be appointed by the Federal Government. Members:*
> *(vi) Additional Foreign Secretary. Member*
> *(vii) Additional Secretary Finance. Member*
> *(viii)Director General, ISPR. Member*
> *(ix) Managing Director, PTVC. Member*

[265] Marco Mezzera, etc. Op. Cit. p. 23.

(x) Director General, PBC. Member
(xi) A representative of the Interior Division."

iii. The purposes set out in the Act do provide for the mandate a PSB should have, but do not ensure impartiality of its editorials. Section 10 lists the functions to be carried out by PBC including 'disseminating information, education and entertainment through programs which maintain a proper balance in their subject-matter and a high general standard of quality and morality' and 'to broadcast such programs as may promote Islamic Ideology, national unity and principles of democracy, freedom, equality, tolerance and. social justice as enunciated by Islam, discourage parochial, racial, tribal, sectarian, linguistic and provincial prejudices and reflect the urges and aspirations of the people of Pakistan…' These provisions suffer same problems of vagueness and partisanship noted in preceding sections with other regulatory provisions governing media in Pakistan. As noted earlier, there are no provisions ensuring independence, impartiality and pluralism of the broadcaster.

iv. The Act vests too much power in Federal Government to interfere in the activities of PBC under Section 10(1)(f):

> *"to carry out instructions of the Federal Government with regard to general pattern or policies in respect, of programs, announcements and news to be put out on the air from time to time…"*

v. The Corporation does not enjoy complete freedom and control over hiring and firing decisions, as Section 11 subjects the hiring decisions subject to "such terms and conditions as" prescribed "by regulations." The Board – which is 'over-run' by the government – has the power to hire and fire employees; whereas, the management should have the power to do so.

Financing

i. PBC, like other government-controlled agencies in third world, relies heavily on government for its funding. It does not have

substantial sources of revenue from advertisement and sale of publications, etc.

Regulatory System

i. A PSB should have complete power to make its own rules, subject to general laws and regulations made by the government. Violating this principle, which ensures independence of a PSB, Sections 21 & 22 of the Act state:

"21. Power to make rules. The Federal Government may make rules for carrying out the purposes of this Act.

"22. Power to make regulations.—
[(1)] The Board may, with the previous sanction of the Federal Government, make regulations to provide for all matters not required to be provided for by rules and for which provision is necessary or expedient for carrying out the purposes of this Act.
[(2) The regulations made under this section on the first occasion, other than those having financial implications may be made so as to have effect from the date of the establishment of the Corporation.]"

ii. There is no provision for an independent advisory and complaint councils.

Pakistan Television (PTV) Corporation

i. PTV enjoys monopolistic control over terrestrial broadcasting services. Like any other large PSB organization, it reaches most households in Pakistan than any other broadcasting organization. In a 2009 survey conducted by Gilani & Gallup Pakistan, it was estimated that 52 million TV viewers in the rural areas of Pakistan, out of a total of 86 million countrywide, viewed PTV.[266]

ii. PTV collects its license fee by charging a tax on citizens and collects through electricity bills.

[266] Gilani & Gallup Pakistan (2009), 'Cyberletter Media'.

Governance

i. PTV, like PBC, is governed and operated by government. Another key reason for state authorities to try to maintain a position of monopoly in terrestrial television was their confidence that, in times of need, cable connections and satellite transmissions could be easily shut down, as was proven in the November 2007 emergency situation.

ii. The close connection between the Pakistani state and the country's dominant TV network is a natural consequence of the fact that PTV is a public limited company entirely owned and controlled by the federal government. Researchers have pointed out that 'due to its statutory configuration, it is the government that determines its editorial and administrative policies. The government, for instance, appoints PTV's Board of Directors. The Board, in turn, elects a chairman and a managing director, who are eventually responsible for the implementation of the corporation's policies.'[267] Permanent members on the board of PTV also include all of government personnel, including the Director General of Inter-Services Public Relations (ISPR), official mouthpiece of Armed Forces.

Regulatory Framework

i. Unlike Pakistan Radio, PTV, being a company, is not regulated by a special charter or stature, rather under the general Companies Ordinance, 1984 (XLVII of 1984). It is subjected to ordinary laws and principles of broadcasting regulations. PTV is criticized for being mouthpiece of government, especially the government. Hardly any substantive opportunity is granted to opponent political parties for expressing their views on national broadcast.

ii. There is no advisory council comprising independent professionals, nor is there an independent complaint council for hearing public comments and complaints against the functioning of PTV.

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[267] Marco Mezzera. Op. Cit. p. 21. The organization structure can be viewed at: http://ptv.com.pk/Management.asp

Recommendations

Problem:6a. **Independence:** Public sector media comprising Pakistan Broadcasting Corporation (PBC), Pakistan Television (PTV), Shalimar Recording and Broadcasting Company, (SRBC) and Associated Press of Pakistan (APP) are under firm government ownership and control, including editorial control. PBC and APP are statutory bodies while PTV and SRBC are public limited companies.

Solution: 6a. All public sector media should be regulated by a law which is guided by best practice principles regarding public service broadcasting. The law should effectively protect public sector media from government control and guarantee their editorial freedom by ensuring that oversight is undertaken by parliament.

Stakeholders: 6a. Government, parliament, political parties, PBC, PTV, SRBC, APP, civil society and media support groups

Problem: 6b. **Mandate:** The stated mandates of all public sector media are vague and open to wide interpretation.

Solution: 6b. The mandates of all public sector media should be set out in clear, concise language in law, based on principles of public service media. There should be guaranteed compliance with these mandates and principles.

Stakeholders: 6b. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

Problem: 6c. **Funding:** The public sector media suffer from acute dependence on government funding, undermining its independence.

Solution: 6c. Funding and budget of all public sector media should be delinked from administrative and editorial controls, while arbitrary withdrawal or reduction in funding should be prohibited.

Stakeholders: 6c. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

Problem: 6d. **Accountability:** The public sector media are not subject to uniform, effective mechanisms of transparency and accountability.

Solution: 6d. All public sector media should have uniform, effective mechanisms of transparency and accountability, including mandatory annual reporting to the parliament and audits of their accounts by independent, approved auditors. Independent advisory councils should be established for these public sector media to provide direct audience feedback, and complaints systems established to deal with public complaints.

Stakeholders: 6d. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

Problem: 6e. **Pluralism:** Lack of clear policy and consistent practice promoting pluralism.

Solution: 6e. A uniform policy for all public sector media should be drafted and adopted guaranteeing accommodation of pluralism including the allocation of a specified percentage of airtime and space for community interest groups representing marginalised segments of society (such as children, women, minorities, persons with disabilities, etc.).

Stakeholders: 6e. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

CHAPTER 7

MEDIA CONTENT REGULATIONS

MEDIA CONTENT REGULATIONS

Offline, online, on air (electronic and print media and internet) content restrictions, defamation, penal provisions, contempt, code of conduct

Content Regulation Under Constitution or its Garb?

i. Courts have time and again held that Article 19 is not an 'absolute', 'unfettered', or 'unrestricted' right and can be qualified by putting 'reasonable restrictions.' Restrictions can be put to protect the aim enumerated in Article 19, as well as a host of other very broad, sweeping and arguably vague aims, such as, "not infringing the rights of others,"[268] "damage prestige of individuals or of a country or a nation,"[269] "publish[ing information] based on truth,"[270] "public interest,"[271] "reputation of people," "friendly relations with foreign state,"[272] "public order, decency, or morality or provisions regarding contempt of Court,"[273] "disdain anti-State or un-Islamic publications,"[274] and "collective interests of the society, peace and security of the State and the maintenance of public order"[275] among other aims.

ii. In limiting overreach of government and executive vis-à-vis Article 19, Courts have made sweeping statements against such overreach, implying that conventional principles of judicial review against abuse of discretion and arbitraries will be applicable:

> *"In determining reasonableness of the restrictions the prevailing condition at the time of legislation may be taken into account. From this, however, it does not follow that absence of manifestly disturbed condition*

[268] PLD 1975 Lahore 1198.
[269] 1990 CLC 1500. The wording indicates that the right may be is beyond frontiers, applicable to any person coming within the jurisdiction of Pakistan's courts.
[270] PLD 2008 Karachi 558.
[271] PLD 2002 Supreme Court 514
[272] PLD 1998 Supreme Court 823.
[273] Ibid.
[274] Ibid.
[275] PLD 1965 Lahore 642.

by itself will be sufficient to strike down the legislation ... The powers are indeed wide but they are to be exercised only if it were satisfied as to the necessity of using them for securing public safety ... There cannot be any presumption that there will be abuse in the exercise of the powers. A case of mala fide exercise of power is always subject to judicial interference."[276]

General Test

i. Pakistani Courts have adopted "imminent and present danger" test developed by United State Supreme Court[277] as test for the reasonableness of the restriction on Article 19 rights, as following:

"Right of expression and speech is conferred by the Constitution and is regulated by law. Every restriction on free speech must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom of expression may be curtailed provided it is justified by the 'clear and present danger' test that the substantive evil must be extremely serious and the degree of imminence extremely high. The danger should 'imminently threaten immediate interference with the lawful and pressing purposes of the law' requiring immediate step to ensure security of the country. Speech would be unlawful if it is directed to inciting or producing imminent lawless action and is likely to produce such action. Speech and conduct are two different concepts. Speech relates to expression and conduct to action. Speech ends where conduct begins but if both are combined the Court has to draw the dividing line. The freedom of expression of views is curtailed or restricted when they threaten clearly and imminently to ripen into conduct against which the public has a right to protect itself."

[276] PLD 1965 Dacca 68.
[277] Mian Muhammad Nawaz Sharif v. President of Pakistan and others. PLD 1993 Supreme Court 473

ii. Court conditioned presence of imminent and clear danger as a test for other exceptions to free speech such as defamation, indecency, etc. to be valid. How this later judgment reconciles with previous opinions that made scope of obscenity and defamation laws wider is not clear. Courts have not, however, developed detailed and clear tests for restriction involving analysis of legitimacy, necessity and validity of legal instrument imposing restraints. The legal regime does create 'chilling effect' on speakers and press by not specifying in advance which speech might be prohibited. This does create the problem of lack of predictability which laws should possess.

iii. There is a plethora of legal instruments available for government, primarily unelected executive branch, to curtail free speech that gives it too much discretion. There are many statements in various statutes and court rulings which make free speech subject to vague qualifications such as "morality," "obscenity," "national integrity," "social values," etc. Such laws vest executive with too much power to regulate free speech.

Respect of Judicial Process

i. The Courts have also burdened the publishers, editors, authors and lawyers – engaging in their right to free speech – abstaining from "using strikingly pungent language which smacks of loud bitterness or aimed at emitting intemperate expression or abnormal understanding suggesting scandalization of the Court or obstruction to the impartial administration of justice."[278] Such broad and sweeping restriction on freedom of speech may be considered outline under jurisprudence of developed democracies. The Courts in Canada and U.S., for instance, allow such kind of critical speech when it comes to professional judges. However, it is pertinent to note that even US Supreme Court is ready to accept the idea that the freedom of press ought to be restricted when it threatens the requirement of fair and orderly administration of justice, especially comments 'of every character upon pending

[278] Ibid. Further, the Court went on to warn, "It' appears necessary that citizens, editors or authors while making a speech or writing articles/editorials or arranging its publication must not use awkward or disrespectful language which may cause ridiculing or undermining the prestige of Court."

trials or legal proceedings may be as free as a similar after complete disposal of the litigation'.[279] Cardinal principle in United Kingdom was eloquently expressed in Ambard v. AG for Trinidad and Tobago[280] by Lord Atkin:

> *"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary man."*

National Security

i. The Courts have been emphatic about the overriding interest of protection of national security. The dominating position that informs Courts' many decisions was expressed as following:

> *"Every inch of the territory of the State being more valuable than the liberty of speech and expression enjoyed by any of its citizens, such liberty cannot on any social, moral, legal or political ground be used as 'democratic' means of liquidating the State that has bestowed that liberty."* [281]

ii. Although this ruling pre-dates Article 19, it has not been overruled or qualified in subsequent case law. Courts have categorized threats to national security as that aimed at "overthrowing government, levying of war, causing rebellion, or creating external aggression," however, it excluded "minor breaches of public order or tranquility." Speech which endangers security is liable to be curbed.[282] Integrity of Pakistan and national security can only be invoked to restrict free speech if it meets the American "imminent, clear and present danger" test adopted in Mian Nawaz Sharif case, cited above.

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[279] Pennekamp v. Florida, 328 US 331 (1946).
[280] [1936] AC 322, 335.
[281] PLD 1957 Lahore 142.
[282] PLD 1958 Peshawar 15.

Defamation

i. Defamation is universally recognized exception to and restriction upon free speech.[283] Developed democracies no longer apply defamation rules as a criminal matter and it is instead a civil action. However, in Pakistan defamation remains a criminal offense under the Pakistan Penal Code (PPC), 1860 sections 499-502, to be tried by Sessions Court. A tort/civil claim can also be pursued under the Defamation Ordinance, under civil court jurisdiction, for damages. The offence is categorized into conventional categories of libel and slander. The Ordinance also provides various defences, which are available in developed jurisdiction as well, such as fair comment, truthfulness, absolute and qualified privilege[284]. The case law has not extended protection against defamation to journalists when they make value judgments and exaggerated criticism of public officials, courts, etc.

Hate Speech

i. Hate speech, internationally, is required to be prohibited under international law.[285] However, it only becomes a "hate crime" when it triggers or incites hatred, discrimination or violence, or threatens a community or group of people based on their race, color, religion or other forms of identity. It restricts and limits one right to free speech. Scholars have pointed that the social and psychological context is very important when interpreting whether a message incites violence against a minority group. For instance, women, in English jurisdiction, have been held to be more susceptible to psychiatric shock, harassment, discrimination, due to their emotional as well as physical states.[286]

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[283] Article 19(3)(a) of ICCPR makes "respect of the rights or reputations of others" a valid and necessary restriction on free speech.

[284] Section 6 of the Ordinance defines Absolute Privilege and Section 7 explains what constitutes Qualified Privilege. Absolute Privilege is "any publication of statement made in the Federal or Provincial legislatures, reports, papers, notes and proceedings ordered to be published by either house of the Parliament or by the Provincial Assemblies, or relating to judicial proceedings ordered to be published by the court or any report, note or matter written or published by or under the authority of a Government." Qualified Privilege is "any fair and accurate publication of parliamentary proceedings, or judicial proceedings, which the public may attend, and statements made to the proper authorities in order to procure the redress of public grievances." This means that if the matter falls under the definition of either of the privileges, absolute or qualified, it is legal to disseminate the information to the public.

[285] Tsesis, Alexander, Dignity and Speech: The Regulation of Hate Speech in a Democracy (May 1, 2009). Wake Forest Law Review, Vol. 44, 2009.

[286] Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials,* 2010 (Oxford University Press: Oxford), p. 330-365.

ii. Pakistani law criminalizes all kinds of hate speech. The rationale on part of legislature is to protect targeted groups - such as Shias, Hazaras, political opponents, etc. - from intimidation of violent and repressive groups or agents that have led to diminished political participation and discrimination. Such discriminatory expressions stymie the depth of pluralistic speech, which makes it a compelling government interest to prohibit such speech.[287] In the context of wave of terrorist events in recent history of Pakistan - many a times against certain speakers and in response to certain types of speech (both content and viewpoint/source based)[288] - Legislature responded by further limiting Article 19 of the Constitution. Perhaps, it is the social and political experience in Pakistan's history that makes society more vulnerable to hate speech, as a trigger of violence and negative socio-political movements against minority communities. This may be kept in mind while assessing wide and expansive laws limiting free speech against exercise of hate speech produced below.

iii. Currently, following laws regulate hate speech in Pakistan:
The Pakistan Penal Code, 1860 extensively bars all types of hate speech (as well as conduct) communicated in all kinds of forms in Section 153-A titled 'Promoting enmity between different groups' that states:

> *"Whoever (a) by words, either spoken or written, or by signs, or by visible representations "or otherwise, promotes or incites, or attempts to promote or incite, on grounds of religion, race, place of both, residence. language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities;*
> *"or (b) commits, or incites any other person to*

[287] See Michael Rosen feld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 Cardozo L/ Rev/ 1523, 1561-62 (2003)
[288] Ed Husain, Explaining the Salman Taseer Murder. Url: <http://www.cfr.org/pakistan/explaining-salman-taseer-murder/p23755> (Accessed on 14-03-2016).

> *commit, any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquility;*
> *"or (c) ... shall be punished with imprisonment for a term which may extend to five years and with fine."*

iv. It may be noted that political speech, essential to the functioning of a democratic government, is not given any privilege in these provisions, nor are journalists provided any 'sensitive treatment'. Nuances involved in hate speech are recognized throughout the world. There is a fine line between hate speech on the one hand, and legitimate discussions or debate about sensitive issues in society, on the other.[289]

v. Pakistani jurisprudence leans more on the side of the argument that in a constitutional democracy, social values outweigh speakers' interests in self-determined expression. This informs strict laws on hate speech. However, the Courts have protected dissenting and unpopular views as outside the fold of criminal hate speech and within Article 19, as following:

> *"Fundamental rights have been placed in the Constitution not merely to protect acts, conduct and views that one may approve of but also, and especially, to protect views with which one may disagree or which even find unpleasant or unacceptable. Expression of views at a political meeting is one form of speech and Article 19 of the Constitution not only protects speech that the listener may approve of or agree with, but also speech that he may disagree with or even hate."*[290]

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[289] See Alice Marwick, et. al., Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape, June 10, 2014, Center on Law and Information Policy, Fordham Law School

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Blasphemy

i. The Penal Code's articles 295-298, collectively known as the blasphemy laws, provide very harsh punishments for religion-based criticism against Islam .Article 295-B which relates to anyone who, "wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose," carries a life sentence. Article 295-C related to, "whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him)" carries the death sentence or life imprisonment.

ii. The law does not distinguish between actual malice and mere performance of a blasphemous act with malice or intention to do so. It makes blasphemy a strict liability without requiring an investigation into the mind of the accused. Criticism of these laws led to the murder of the sitting Governor of Punjab, Salman Taseer. In a landmark decision, the Supreme Court held that criticism of the blasphemy laws does not constitute to be blasphemy, stating:

> *"Criticism of misapplication or misuse of law regarding blasphemy ... [s]uch criticism did not amount to "blasphemy" itself. Citizens in a democratic society had a right to contend, debate or maintain that a law had not been correctly framed by the State in terms of the mischief sought to be suppressed or that the law promulgated by the State ought to contain adequate safeguards against its misapplication or misuse by motivated persons. Seeking improvement of a man-made law in respect of a religious matter for better or proper enforcement of such law did not ipso facto amount to criticizing the religious aspect of such law."*

iii. A rationale for such strict blasphemy laws may rest solely on religious standards of Pakistani society. It is evident that

blasphemy laws in Pakistan treat desecration of the Quran and visual depiction of Prophet Muhammad are most serious transgressions. Such speech is considered to be hate speech as harmful as racial or sexual discrimination; it is considered to be defamatory, disparaging entire group of people based on their religious identity. However, the laws go beyond any precedent from fellow Muslim countries in penalizing such offences.

iv. Public safety, discussed below, has also become a local concern whenever exercise of blasphemous speech against Islam takes place globally, transmitted through Internet or conventional mediums.[291]

Public Safety

i. The West Pakistan Maintenance of Public Order Ordinance, 1960 also legislates under Section 3 against speech that "causes or is likely to cause fear or alarm to the public or to any section of the public… or is likely to further any activity prejudicial to public safety or the maintenance of public order" with a sentence of imprisonment of up to three years, with a fine.

ii. Maintaining public order is viewed as a 'social value' that the government may protect by balancing against rights of speakers.[292] In protecting democracy, such narrowly tailored criminal laws are deemed valid to protect public against intimidation. Courts have implied that right to liberty under Article 10 of the Constitution of Pakistan is curtailed by the said ordinance, and requires detaining authorities to produce material on record for judicial review.[293] It also puts burden of proof on detaining authority. Precise scope of threatening speech or material that may be "prejudicial to public order" has not been laid in the jurisprudence, and is supposed to be decided on case to case basis, subject to broader laws on free

[291] "Arson and Death Threats as Muhammad Caricature Controversy Escalates," Spiegel Online, February 4, 2006; Enayat Najafizada and Rod Nordland, "Afghans Avenge Florida Koran Burning, Killing 12," New York Times, April 2, 2011.

[292] US Courts have recognized public safety to be a legitimate and necessary aim to be protected and balanced against free speech in Schenk v. Pro-Choice Network, 519 U.S. 357, 375-76 (1997) and in New Jersey v. T.L.O., 469 U.S. 325, 351-53 (1985).

[293] Aurangzeb Khan V. Government of Khyber Pakhtunkhwa (KP). 2016 MLD 330.

speech. Merely because a person or an organization has been banned cannot lead to detention or application of the ordinance for a future speech or expression without concrete evidence of actus rea of crime.[294]

iii. The Anti Terrorism Act (ATA), 1997 prohibits speech that is intended to, or likely to stir up sectarian hatred: "A person who uses threatening, abusive or insulting words or behavior; or…displays, publishes or distributes any written material which is threatening, abusive or insulting: or words or behavior; or distributes or shows or plays a recording or visual images or sounds which are threatening, abusive or insulting: or has in his possession written material or a recording or visual images or sounds which are threatening, abusive or insulting with a view to their being displayed or published by himself or another, shall be guilty of an offence if: he intends thereby to stir up sectarian hatred; or having regard to all the circumstances, sectarian hatred is likely to be stirred up thereby."

iv. The provision under ATA is way too broad and vague to be brought under an anti-terrorism act, when it comes to criminalizing "abusive" and "insulting" remarks or behavior. This does not constitute a legitimate aim for restricting speech, as an objective treatment of subjective reception of speech by the audience is very difficult to achieve. Moreover, the Courts have not explicated whether actus rea of a threatening statement is enough or the mens rea of speaker might be important as well.

Article 204: Contempt Of Court

"A Court shall have power to punish any person who:

a. Abuses, interferes with or obstructs the process of the Court in any way or disobeys the order of the Court;

b. Scandalizes the Court or otherwise does anything which tends to bring the Court or a judge of the Court into hatred, ridicule or contempt;

[294] Mst. Shamim Bibi v. Government of Punjab. 2003 YLR 3204 Lahore High Court, Lahore.

c. Does anything which tends to prejudice the determination of a matter pending before the Court; or

d. Does any other thing which, by law, constitutes contempt of the Court..."

i. The ambit of Article 204 is limited to High Courts and the Supreme Court. The Article does not provide a comprehensive definition of 'contempt', however, it lays down the actus rea, i.e. physical act of crime, of contempt of court. Academics have classified contempt of courts into three different categories: scandalising the court, abusing the parties before the court and prejudicially affecting the conduct of the court. The protection against the abuse of the process of court competes against the right to free speech, and restricts the latter's constitutional right. The ambit of the constitutional guarantees against contempt of court has led to impeachment of a sitting Prime Minister, head of the national parliament in recent constitutional practice of court, outweighing rights and privileges internationally recognized for political process in favour of respect for Court.

ii. Courts have long been emphatic about protection against any prejudicial remark or activity against the court. In Ch. Zahur Ilahi versus Mr. Zulfikar Ali Bhutto[295], the Court warned sitting Prime Minister that if his speeches prejudiced sub judice matters and contained any implied threats to the Court, it would not be protected under Article 248 and contempt of court proceedings would be initiated against the Prime Minister. The judgment significantly curtailed parliamentary privilege and removed the protection parliamentarians usually enjoy in more developed democracies against critical comments on judicial matters.[296]

iii. Supreme Court in Contempt Proceedings against Imran Khan, Chairman, Pakistan Tehreek-I-Insaf,[297] held a chairman of a

[295] Citation: PLD 1975 SC 383.

[296] For instance, in United Kingdom, Article IX of the Bill of Rights states: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or question in any Court or Place out of Parlyament." House of Lords Constitution Committeee, *Parliamentary Standards Bill: Implications for Parliament and the Court,* 18th Report, Session 2008-09, HL 135. See also. A. Le Sueur, et. al. *Public Law: Text, Cases, and Materials,* 2ndedn (2013, London: Oxford), p. 132-133.

[297] PLD 2014 Supreme Court 367

political party for calling conduct of judiciary "shameful," even though the comment did not concern a pending judicial matter. The Court found the comment to be prima facie in contempt of court. However, the politician 'attributed it to a misunderstanding' and that he was merely complaining about administrative conduct of returning officer nominated by subordinate judiciary. The Court held that 'no reason existed to doubt the bona fide of the alleged contemnor or to disbelieve his statement about judiciary'. Generally, Courts have held such remarks against judges to be derogatory and beyond Article 19, and have punished speakers,[298] even though such comments may not affect administration of justice in a pending case.

Recommendations

Problem: 7a. **Censorship:** Broad, vague content restrictions, including in laws, from both the colonial and post-colonial periods unduly limit what can be published, broadcast or communicated online.

Solution: 7a. A wide-ranging review of all content restrictions in different laws should be conducted and these restrictions should be repealed or amended, as necessary, to bring them into line with international standards.

Stakeholders: 7a. Federal government, parliament, political parties, representative associations of media owners and workers, civil society, Law and Justice Commission of Pakistan and media support groups

Problem: 7b. The contempt of court law unduly restricts fair commentary on judicial processes, court judgements and conduct of judges.

Solution: 7b. The contempt laws should be reviewed to remove arbitrariness in favour of free speech.

Stakeholders: 7b. Federal government, parliament, political parties, representative associations of media owners and workers, civil society, Law and Justice Commission of Pakistan and media support groups

[298] 2013 SCMR 170.

CHAPTER 8

MEDIA INTERMEDIARIES – TELECOM and INTERNET

MEDIA INTERMEDIARIES – TELECOM and INTERNET

Structures, internet access, online free speech, online censorship

Introduction

i. Pakistan is signatory to various international conventions and resolutions on protection and guarantee of free speech. Free speech right is unique in the respect that it can be exercised through various mediums.[299] Special nature of these mediums leads to differentials in regulatory treatment; the variables affecting speech rights differ as well. Telecommunication industry for long has been privatized in the world, with which broad laws favouring free speech and limiting state interactions have been implemented in developed democracies. The conventional provisions on protection and guarantee of free speech apply to telecommunications along with competition laws, and equitable and neutral treatment by the state.

ii. Pakistan has ratified the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of expression. It calls for broad and expansive laws conferring people with power to exercise free speech, while creating limited and specific permissions to governments to restrict expression to protect certain competing. It includes compelling government interests such as the "protection of national security or of public order, or of public health or morals." Hence, no law abridging free speech can be made unless provided for in the law. It is not enough for a law to pass the test under international law if it is prescribed in the law. The law creating restrictions on free speech has to be absolutely necessary, protecting legitimate interest and proportional to the risk caused to the competing interest.

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[299] See Chander, Anupam and Le, Uyen P., Free Speech (February 25, 2014). Iowa Law Review, Vol. 100: 501; UC Davis Legal Studies Research Paper No. 351. Available at SSRN: http://ssrn.com/abstract=2320124 or http://dx.doi.org/10.2139/ssrn.2320124

iii. A frequent state intervention in telecommunication medium abridging free speech involves censorship, blocking and filtering of content and the telecommunication services. The UN Special Rapporteur for Freedom of Opinion and Expression in his 2011 report to the UN Human Rights Council obligates governments to conform with Article 19 of ICCPR, i.e. the law should be clearly stated and enacted, open to public scrutiny, serve legitimate interests, be necessary and proportionate, and reviewable by judicial or independent bodies.[300]

iv. International law also requires that 'a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.'[301] As we would observe below, Pakistan's telecommunication law has been geared towards violating established norms of free speech and protection of it on telecommunications. The law vests executive too much power to refuse or revoke licenses to service providers, cut off people from telecommunication services, block access to vital sources of information, direct licensees to curtail speech and access to information – all of which with an arbitrary manner, without an internal review and complaint system, providing cogent reasons, and fair and equitable treatment.

v. The increased sophisticated filtering and blocking systems employed by regulatory regimes in Pakistan is troubling and must be put to immense public and judicial scrutiny. The environment fostered by regulatory bodies under government lacks transparency, openness and accountability. International law requires open and transparent procedure for blocking content and information providers, i.e. websites, platforms, etc, with full details and reasons for blockages or filtering. Such determination of blocking or filtering content and medium should be overseen by judiciary or independent bodies free from political, commercial or other influences.

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[300] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, p. 31.
[301] General Remark 25:**Human Rights Committee, 102nd session, Geneva, 11-29 July 2011**

vi. International law opposes measures to curtail access to mobile and internet services.Shutdown of Internet or mobile service entirely is inherently disproportionate. Such bans, routine matter in Pakistan, are clear violations of Article 19 of ICCPR, which continue with impunity. In Pakistan, internet censorship regime is ad hoc, whimsical and shrouded in secrecy. It is often exercised without legal authority, and without clear criteria and process of regulation content at such a wide-ranging scale. The laws are also vague and in contravention of international standards.

vii. The ICCPR recognizes the right to restrict free speech in protection of the rights and reputations of others; however, it subjects these restrictions to certain tests and requires it to be construed with care. It abhors "excessively punitive measures and penalties." Moreover UN Human Rights Committee denounces imprisonment as a penalty for defamation or such offences against decency.

viii. Pakistan's policy of privatization and deregulation led to the opening and exponential growth of telecommunications sector, which was also its obligation under World Trade Organization. Pakistan is also a member of International Telecommunication Union.[302]

ix. Article 17 of the ICCPR protects the right of private communications. It requires that the integrity and confidentiality of communication should be protected de jure and de facto. The Article states:

> 1. *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
> 2. *Everyone has the right to the protection of the law against such interference or attacks."*

[302] List of Member States. ITU. Url: <https://www.itu.int/online/mm/scripts/gensel8> (Last accessed on 02-03-2016.)

x. When it comes to technology, Pakistan can often have a violent environment to operate it in. As Freedom House in its Freedom on the Net report notes, "In Pakistan, a woman was stoned to death by local men in June 2013 after a tribal court convicted her of possessing a mobile phone. Also that month, a group of men fatally shot a woman and her two daughters in the country's north after a video of the women laughing, which male family members considered shameful, circulated on local mobile networks." As per its comprehensive assessment, Pakistan was ranked at 67 in 2014, whereas in 2013 it was at 63rd position. Pakistan has many obstacles to access, has limits on content and violates users' rights.[303]

Pakistan's Telecommunication Regulation Framework

i. The earliest telecommunication laws that are still operative in Pakistan include the Telegraph Act, 1885 (XIII of 1885) and the Wireless Telegraphy Act, 1933 (XVII of 1933). The Wireless Act of 1933 governs the licensing of telecommunication apparatus; whereas, the Telegraph Act of 1885 was one of the earliest laws regulating the licensing and installation of telegraphs as well as prohibited 'fabricated' and 'obscene' "messages".[304] The current telecommunication legal regime – including licensing, operations, maintenance, content regulation, etc. – is wholly governed by the Pakistan Telecommunication (Re-organization) Act, 1996 (XVII of 1996) (henceforth referred to as the 'PTA Act'). As far as a content regulation goes, the PTA Act has further restricted speech and vested executive with excessive power to curtail it – unimaginable under Wireless and Telegraph acts.' In this section, we would provide an in-depth analysis of the PTA Act's regulation of telecommunication sector in relation to its impact on freedom of expression.

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[303] Available at: https://freedomhouse.org/sites/default/files/resources/FOTN%202014%20Summary%20of%20Findings.pdf

[304] As defined under Section 2(3) of the Act: '"message" means any communication, whether in written, printed , pictorial or spoken form, transmitted, emitted, made, received or delivered by telegraph or given to a telegraph officer to be transmitted or emitted, and includes all contents thereof.' Section 29 prohibited fabricated and obscene messages as: "If any person transmits or causes to be transmitted by telegraph a message which he knows or has reason to believe to be false and fabricated, or a message which is indecent or obscene, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

Pakistan Telecommunication Act: 'The Master Switch'?

i. Tim Wu, a telecommunication expert, in his book the Master Switch[305] introduces the concept of "the Cycle" telecommunications industry, such as that of United States, that is, the propensity for 'information empires' to begin with a period of openness, transparency and novelty, but eventually moving towards a regime of monopoly and centralization, with a closed approach. However, in Pakistan, the laws had the potential to seriously curtail free speech by centralizing power in government, it is only recently after boom in the telecommunication industry that increasingly serious violations of free speech have started to take place. The regulatory authorities are being used as a 'master switch' – one-stop, easy, accessible tool for government to put blanket bans, with highest degree of disproportion, on content and technologies, in direct violations of constitutional obligations and rights.

ii. The PTA Act 'transferred the telecommunication services to the private sector', as per its preamble. It establishes under Section 3 the Pakistan Telecommunication Authority (henceforth referred to as the 'PTA'). The Act burdens the speech rights of licensees as well as that of users by blocking, filtering and interfering with production and receiving of content. The PTA also has a history of violating rules of competition which affect plurality or diversity of platforms to exercise speech. It lacks independence and review mechanisms to enforce constitutional guarantees of free speech.

iii. PTA consists of three members, all appointed by Federal government, including, a 'professional telecommunication engineer', a 'financial expert' and a chairman. Section 2(g) directly gives PTA the power to impact free speech of telecommunication users. In order to ensure independence of the regulatory body, the act prohibits any conflict of interest in terms of financial interest in telecommunication establishments. Lahore High Court extended the definition of conflict of financial interest to spouses and blood

[305] *The Master Switch: The Rise and Fall of Information Empires,* (2010).

relations as well. Hence, in Barrister Sardar Muhammad vs. Federation of Pakistan,[306] it held:

> *"Explanation provided under S. 3(4) of Pakistan Telecommunication (Re-organization) Act, 1996 brought under its fold even the involvement of a spouse or blood relation of any Member with any telecommunication establishment. Such statutory pre-condition for a Member to be unbiased, insular, unconnected and impartial actually defined the character of the public institution."*

iv. The PTA Act defines 'intelligence' as 'any speech, sound, data, signal, writing, image or video'. It also governs the licensing – including the granting, renewing and enforcing of it under Section 5 – of telecommunication services or systems, defined in most broad terms. PTA is also vested with authority to allocate radio frequency among public, commercial and non-commercial operators, which is scarce public good, and permit more strict regulation of the operators and content. Its function under Section 4 is to promote access of telecommunication services with high quality.

v. Renewal of license is not considered any violation of constitutional provision, including free speech. Supreme Court of Pakistan, in Pakcom Limited vs. Federation of Pakistan,which concerned renewal of licenses and its impact on right to trade, upholding the validity of license fees, stated:

> *"[License] fee, which was to be paid for Radio Frequency Spectrum and was owned by State as one of its precious resources, by no stretch of imagination was either confiscatory or ex proprietary or violative of Arts. 18, 23, 24 & 25 of the Constitution. Provisions*

[306] PLC(CS) 2013 Lahore 625.

of Article18[307] of the Constitution were not attracted in the matter of license fee because the right guaranteed by Art.18 was not an absolute right and was always subject to restriction in accordance with the provision itself or any other law made in that regard. No guarantee to the effect that "what was regarded as an object of trade would continue to be so regarded forever." When a certain article became contraband and ceased to be a legitimate object of trade, there could be no question of any Fundamental Right to trade in that article."

vi. Section 6 requires PTA to act with openness, transparency, equity and fairness towards licensees. Section 8 vests Federal government with power to issue policy directives on practically every matter and concern of PTA. The government can 'only' issue directives under Section 8(2) on the 'number and terms of licenses', 'framework for telecommunication sector development scarce resources', 'requirements of national security' and government's relations with other sovereigns. PTA is bound under Section 21(1)(c) while granting licenses to take into account policy directives under Section 8.

vii. The licensees are afforded some protection against unilateral revocation of licenses. If a license has to be suspended or revoked, show cause notice has to be given under Section 23. Moreover, after due process, if the license is to be suspended and revoked, it has to be done in writing. It is not given if the administrator of PTA has to provide reasons or grounds for revocation, which is necessary for appealing to a higher forum. PTA Act does not provide a forum for appeal against orders. A threat to speech rights

[307] Article 18 of the Constitution of Pakistan, 1973 states: "Freedom of trade, business or profession. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business: Provided that nothing in this Article shall prevent:- (a) the regulation of any trade or profession by a licensing system; or (b) the regulation of trade, commerce or industry in the interest of free competition therein; or (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons."

of service providers and users also lies in following directives of government, which can lead to suspension (which we will discuss later on'; sub-section 1(ii)).

viii. There is no provision to provide access of services to disabled persons, like Section 255 of the United States Telecommunication Act, 1996. There is a requirement under Section 33B for licensees to contribute to a fund to provide access to people in un-served, underserved, rural and remote areas. There are separate rules for assessing which areas fall under the category for the fund, namely, Access Promotion Regulations, 2005. In *Wateen Telecom (Private) Limited vs. P. T. A.,*[308] PTA suspended 'incoming traffic of petitioner' by Long Distance International (LDI) for not depositing Access Promotion Contribution under Section 33A & 33B for Universal Service Fund. Court declared PTA's decision unlawful and without lawful authority' license. PTA could only impose fine and not suspend license at all.

ix. The PTA Act does not establish a separate, independent body which can review and decide upon complaints of licensees, users and other stakeholders. There is an internal complaint mechanism. A complaint can be lodged only after lodging a complaint with a service provider. There is no separate allocation of resources or personnel to process complaints in an open and transparent manner; nor are complaints and responses publicly published.

Hitting the Nail on the Head: Obstacles to Access to Technology in Light of International Law[309]

i. PTA under the auspices of Federal Government has found that if it is not technologically possible to censor speech that violates its assessment – as it is most of the times – it is safe to ban the technology and services, thereby not only violating free speech but also right to receive information and access to information. The

[308] PLD 2010 Lahore 260.

[309] In developing this section, insights from Article 19's report, Pakistan: Telecommunications (Re-organization) Act: Legal Analysis. Url: <https://www.article19.org/data/files/medialibrary/2949/12-02-02-pakistan.pdf> (Last accessed on 21-03-2016.), have been heavily relied upon.

PTA Act has many provisions that violate international standards, and should be repealed. The Act gives PTA unbridled powers to terminate or suspend licenses over patently vague and broad allegations of spreading 'false information', 'obscenity', 'mischief' as well as interception and surveillance of information in violation of user's privacy rights to speech.[310]

ii. The PTA Act authorizes termination of all licenses and disconnect telecommunication services under Section 21(4)(f). The only requirement is to issue 'written notice' to whoever misuses the terms and conditions of the license. The terms and conditions, which we would discuss in detail further on, are too cumbersome. For instance, as noted earlier, Section 54(3) allows the President and the Federal Government "upon proclamation of emergency [to] suspend or modify all or any order or licenses made or issued under this Act or cause suspension of operation, functions or services of any licensee for such time as it may deem necessary." Such a sweeping, universal suspension of telecommunication services is a grave threat to free speech. Such powers were used in 2007 when martial law was imposed by the then President, Gen. Pervez Musharraf, which saw the worst ever blackout of private media and telecommunication systems.

iii. The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, along with other rapporteurs from Africa, the Americas and the OSCE, issued in May 2011, "Joint Declaration on Freedom of Expression and the Internet" to protect access to internet:

> *Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs*

[310] Free speech is interlinked with many other rights such as free press, freedom of association as well as privacy, as the latter protects any unwarranted interference with the speech of users and its audiences.

imposed on the Internet or parts of the Internet.

iv. Article 21(4)(f) and Article 54(3) of the PTA Act lack judicial oversight and vest executive with too much power to shut down services. The circumstances for such blanket ban on access of information should be limited to specific cases. The law is also inconsistent with the ICCPR conventions formulations as expressed by UN Special Rapporteur's statement, as following:

> *"[C]utting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights."*[311]

v. The PTA Act also authorizes interception of communications, which is another area of grave concern under international law. There are hardly any limitations on exercise of such blatant breach of privacy rights of speakers and audiences. Under Article 54(1), PTA is authorized by the Federal government, "in the interest of national security or in the apprehension of any offense," to intercept communications. The law does not provide overriding limitations which may regulate rules made by Federal Government on the interception of information under Article 57(2)(ah). International law permits those restrictions of privacy rights which are applicable to freedom of expression. Specific circumstances of the restrictions must be provided under the law in clear terms. Broadness of such provisions is uncalled for and only suits if it broadens free speech rights, not the other way round. General Comment 16 on the Right to Privacy by the UN Human Committee prescribes authorized interferences to be made by a 'designated authority' on a 'case-by-case basis'. It also violates Article 17 of ICCPR, to which Pakistan is a signatory.

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[311] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16-05-2011.

vi. Pakistan has been an incessant victim of terrorism since twin towers in United States fell to the ground in a tragic act of terror. To counter terrorism, government needs intelligence, and given unending terror incidents, the impulse is to breach free speech and associated privacy rights. The UN Special Rapporteur on promotion and protection of human rights and fundamental freedoms requires that in countering terrorism, integrity of Article 17 must be maintained. A warrant must be obtained for surveillance, based on reasonable doubt or lead. Unbridled powers to curtail free speech and interfere with it create a powerful chilling effect; it undermines confidence in technologies and ability to communicate privately. He stated:

> *"[A]rticle 17 of the Covenant should also be interpreted as containing the said elements of a permissible limitations test. Restrictions that are not prescribed by law are "unlawful" in the meaning of article 17, and restrictions that fall short of being necessary or do not serve a legitimate aim constitute "arbitrary" interference with the rights provided under Article 17."*

vii. A leak confirmed that Pakistan has been employing sophisticated snooping and surveillance tools, such as FinFisher, targeting domestic users of telecommunications.[312] It is stated that 'FinFisher is a company that sells a host of surveillance and monitoring software to government departments. The primary software, FinSpy, is used to remotely access and control the computers or mobile phones belonging to the people being spied on.'[313] Three netsweeper software were purchased worth Rs. 57 Million for the purposes of political, social filtering and surveillance. Moreover, 'University of Toronto based research group called Citizen Lab released a report last year identifying two

[312] DRF, Pakistan is a FinFisher customer, leak confirms. 22-08-2014. Url: <http://digitalrightsfoundation.pk/pakistan-is-a-finfisher-customer-leak-confirms/> (Last accessed on 05-03-2016.) See full report by Citizen Lab at: https://citizenlab.org/storage/finfisher/final/fortheireyesonly.pdf.
[313] Ibid.

FinFisher command and control servers on the PTCL network.'[314]

viii. UN Human Rights Committee has stated that such "generic ban," as on YouTube, and filtering 'the operation of certain sites and systems is not compatible with the ICCPR'. La Rue, the UN special rapporteur, in his statement in May 2011 stated:

> *"Censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights. Any requests submitted to intermediaries to prevent access to certain content ... should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences."*[315]

The Curious Case of YouTube Ban

i. In 2012, a private film considered as blasphemous in several Muslim-majority states, including Pakistan, the Innocence of Muslims, was uploaded on YouTube by a user of the video-sharing website. The Government of Pakistan approached Google to ban the video since local laws criminalize blasphemy. Google replied that a video could only be removed if it violated community guidelines or was voted against by a certain numbers. Since Pakistan did not have a localized version of YouTube back then, which came into being in 2016,[316] Google refused to ban smaller clips of it, after removing the full-length movie.

ii. The incident led Supreme Court of Pakistan to intervene and direct the PTA to ban the video or any other with blasphemous content.[317] PTA instantly banned the YouTube on directions of Federal

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[314] Ibid.
[315] Human Rights Committee, General comment No. 34. United Nations. Url: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> (Last accessed on 09-03-2016.)
[316] Aamir Attaa, YouTube Blocks Blasphemous Content in Pakistan. 18-01-2016. ProPakistani. Url: <http://propakistani.pk/2016/01/18/youtube-blocks-blasphemous-content-in-pakistan/> (Last accessed on 23-03-2016.)
[317] Vide Order dated 17-09-2012, in Constitutional Petition No. 104 of 2012. Available at: http://bolobhi.org/wp-content/uploads/2014/09/SC-order-in-Const-P-104-dated-17.09.2012-1.pdf (scanned copy).

Government, which was directed by Inter-Ministerial Committee for Evaluation of Websites (IMCEW).

iii. The ban led to couple of writ petitions before high courts. One such petition was filed by Bolo Bhi before the Islamabad High Court in 2014,[318] (henceforth referred to as the 'Writ Petition') on ground that the 'Notification and the entire machinery and process put together to block websites and URLs and undertake Internet Censorship pursuant to it ultra vires of (i) constitutional due process and fundamental rights guaranteed under Articles 4, 8, 9, 19, 19A and 25 of the Constitution, (ii) the [PTA] Act, (iii) the Rules of Business, 1973, (iv) Section 24-A of the General Clauses Act and (v) the rules of natural justice.' It challenged the arbitrary and unlawful manner in which Federal Government uses PTA to curtail free speech and telecommunication services.

iv. The Writ Petition also noted that how the executive "broadly, and routinely exercised [the powers under PTA Act] to order blockage of any website or URL they deem 'offensive,' 'objectionable' or 'obnoxious'." The 'root of evil' lay in unlawful authority exercised by IMCEW. The troubling factor of the whole episode was lack of authority of PTA. It was used as a rubber stamp, whereas IMCEW decided unilaterally what content to block or filter. IMCEW was constituted by a notification dated 29-08-2006 by the Federal Government, for 'finalizing procedure for blocking of websites'. The Writ Petition pointed out that IMCEW 'failed to develop a criteria and procedure for doing its job during last eight years of its existence … [and that] there is no public record of either the meetings convened by it or the recommendations made in the aftermath of its meetings … [It] continues to function in an ad hoc, arbitrary and whimsical manner and while it continues to order blockage of websites[319] and Internet censorship.'[320]

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[318] Writ Petition No. 4994/2014. Bolo Bhi, etc. vs. Federation of Pakistan, etc. Available at: https://issuu.com/bolobhi/docs/bolo_bhi_s_petition (signing up with Issuu.com required)/

[319] See Web Desk, WordPress temporarily blocked in Pakistan, 22-03-2015. The Express Tribune. Url: <http://tribune.com.pk/story/857401/wordpress-temporarily-blocked-in-pakistan/> (Last accessed on 03-03-2016.)]

[320] P. 2.

v. In lieu of Bolo Bhi's writ petition, 'the Islamabad High Court (IHC) … restrained … [IMCEW] from blocking websites until the conclusion of the case without the court's approval. The committee was restrained from issuing any directions to the Pakistan Telecommunication Authority (PTA) to block websites without approval of the court [ad interim].'[321] The matter is still sub-judice before the Court. Bolo Bhi has amended its petition and objected to Section 9.8 of the Telecommunication Policy launched by the Ministry of IT in January 2016, 'which seeks to empower PTA with content management powers online'.[322]

vi. As fallout of YouTube episode, it is yet to be seen if any guidelines are put in place to restrict government from putting blanket bans on telecommunication, which are lifeblood of innovation, commerce, education and speech rights. Web and telecom platforms continue to be blocked with impunity.[323] The law needs overhaul at the highest levels.[324] It has to be understood that YouTube is an intermediary and it cannot be punished for wrongs of its users. Emphasizing this point, In addition, in his 2011 report to the UN General Assembly, La Rue wrote:

> *"[H]olding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law."* [325]

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[321] Civil Miscellaneous application No. 24 of 2015 in Writ Petition No. 4994 of 2014, Bolo Bhi, etc. Federation of Pakistan, etc. in the Islamabad High Court, Islamabad.

[322] Farieha Aziz, Bolo Bhi challenges Section 9.8 of Telecom Policy in Court. 03-03-2016. Bolobhi. Url: <http://bolobhi.org/bolo-bhi-challenges-section-9-8-of-telecom-policy-in-court/> (Last accessed on 06-03-2016.)

[323] As the writ petition of Bolo Bhi notes, '[There is] increased monitoring, regulation and control of access to online content available on the Internet. Currently, the number of websites blocked in Pakistan range between 20,000 and 40,000 … The amount of online content reported for restriction of access thereto increased astronomically for the period of January to June 2014 during which Respondent No. 1 and Respondent No. 3 reported 1,773 pieces of online content to Facebook for blocking. The content restriction were once again not limited to blasphemous content but in fact also pertained to 'criticism of the state.'

[324] For a discussion of increasing state censorship, see Joseph S. Nye, Jr, Cyber Power, In Joseph S. Nye, Jr., The Future of Power in the 21st Century (2011). Available at: http://belfercenter.ksg.harvard.edu/files/cyber-power.pdf.tan.pdf

[325] Op. Cit.

Elephant in the Room: Content Regulation under PTA Act

i. The PTA Act has various substantive provisions which are vague, outdated and curtail free speech rights beyond the standards established under international law. It contains criminal penalties on ill-defined and outdated offences such as 'obscenity', 'mischief', 'false information', etc. Article 19, an international organization that advocates free speech rights, conducted a detailed and comprehensive analysis of each provision of the PTA Act that restricts content creations and transmission on telecommunication devices or services, and identified some key provisions in violation of international standards on free speech, (henceforth referred to as the 'Report').[326]

ii. Article 19 identified following provisions as existing, grave threat to freedom of expression:

   a. *Section 31(d): 'unauthorisedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, indecent or obscene';*

   b. *Section 31(h) 'commits mischief';*

iii. *'False and Fabricated Information'.* As set out above, Section 31 of the PTA Act prohibits the communication of "false" or "fabricated" information knowingly or negligently transmitted without any other requirements. Negligence in communicating 'false' information should not be a test for disseminating information. Actual malice, with intent to harm reputation, in reporting false information may be a proper test. Section 31(d) is clearly disproportional as it does not balance free speech with competing rights. Moreover, in today's world, the Report notes, "it is extremely difficult to determine what is "true" or "false" or

[326] Article 19's report, Pakistan: Telecommunications (Re-organization) Act: Legal Analysis. Url: <https://www.article19.org/data/files/medialibrary/2949/12-02-02-pakistan.pdf> (Last accessed on 21-03-2016.)

"fabricated" for the following reasons:

a. "First, in situations of rapidly developing news, or where different sources contradict each other, facts may be difficult to check. If, however, journalists have the sword of a false news law hanging over their heads, they might simply decide not to report news of which they are not completely certain at all, for fear of ending up in jail. As a result, citizens will be deprived of potentially vital information on current developments.

b. "Second, facts and opinions are not always easily separated. In many cases, opinions are expressed through superficially false statements, such as sarcastic, satirical, hyperbolic or comical remarks. A ban on false news can thus easily become a ban on opinions not favoured by the authorities, endangering the free confrontation between different points of view which lies at the heart of democracy.

c. "Third, the provisions fail to recognise that it is often far from clear what the "truth" on a particular matter is. If a particular "truth" is well-established at the moment, it may not always remain that way. New opinions and new ways of thinking often replace old ones. No authority holds the absolute truth. To give the government that power allows it to silence anyone with whom it may disagree, no matter the veracity of the matter."

iv. Therefore, criminalizing dissemination of 'false intelligence curtails impact both the right of freedom of expression and the free exchange of information and discussion. It also affects journalists who are granted more leeway in reporting on news, especially on public matters and officials. The OAS Special Rapporteur for Freedom of Expression stated:

" [T]he effect that this principle has is precisely opposite to the one that its proponents argue as the basis for its application. In other words, the search for

truth in information would be severely hampered by inhibiting the free flow of information for fear of possible penalties. The right to freedom of information also protects all the information that we have labeled 'erroneous'."

v. UN has already made it clear that such provisions are a threat to journalists, particularly. The Human Rights Committee has stated that "the prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant [ICCPR]."[327] The Committee has also repeatedly stated that false news provisions "unduly limit the exercise of freedom of opinion and expression."

vi. *Indecent or Obscene Materials.* (See Chapter 8 for further detail.) Article 31(d) also prohibits the dissemination of materials, which are "indecent or obscene," which is in line with Article 19(3) of the ICCPR that permits restriction on free speech in order to 'protect public morals'. In contravention of international law, PTA and other authorities have been banning material online with impunity and have conferred on itself 'open ended ability to ban all materials which officials might find offensive'.[328] PTA and IMCEW have not laid down clear guidelines on content blockage on this ground, and have been acting in a whimsical manner.

vii. Pakistan has a multi-ethnic, multi-religious and multi-sectarian society. The Report adds that as noted 'by the Committee in General Comment No 34: the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of

[327] Report of the Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106, Doc. 13-04-2000.
[328] As the Writ Petition notes that most of content blockage online are 'not limited to blasphemous content but in fact also pertained to 'criticism of the state'.' Pages of music bands have been temporarily banned, such as Laal.

human rights and the principle of non-discrimination'. Given the dynamic nature of moral norms, censorship of such speech should be done carefully and should not lead to complete ban of access to technologies. The UN Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights notes:

> *Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.*[329]

viii. The Report notes that this section has been cited by the Authority in the justification of Decree CPD-2(101)/11-PTA of 14 November 2011, on "Implementation – Content Filtering Through SMS" which requires that telecommunications providers filter hundreds of words in English and Urdu.[330] After reviewing it, the Report declared it to be a 'serious violation of international law relating to both freedom of expression and privacy to require that all communications be monitored and blocked on the basis of this seemingly arbitrary list, which includes many common words, names of celebrities and others clearly non-obscene materials.'[331] As a matter of international law, all filtering systems are subject to strict limitations. International representatives on 'freedom of expression declared in 2011 that filtering systems were not justified under international law':

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[329] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, U.N. Doc E/CN.4/1984/4 (1984), pp. 17-18.
[330] Pakistan Telecommunications Authority, Implementation – Content Filtering Through SMS Letter; available at http://content.bytesforall.pk/sites/default/files/PTA%20Letter%20on%20Content%20filtering_0.pdf.
[331] P. 12.

Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.[332]

The said filtering of words on mobile was withdrawn by PTA as of November, 2011, due to public outcry.[333]

ix. *Mischief.* Finally, the Report pointed out that Section 31(h), 'which creates a penalty for any person who "commits mischief,"' to be inapplicable 'in the telecommunications arena'. There is no explanation under PTA Act for what mischief means or what it means to be commit 'mischief' using a telecommunication service. The Report also notes that '[t]here is also no requirement of harm. This provision is too vague to be legitimate under international law'. The harm has to be defined precisely, otherwise said Section amounts to giving executive too much discretion to define it at its own will, without any oversight. The Report proposed that mischief should be clearly defined in proposed laws such as Prevention of Electronic Crimes Ordinance (which is now enacted as the Prevention of Electronic Crimes Act, 2015), 'or in the criminal law in sections on cyber-related offenses such as hacking, fraud, or denial of service. As it currently stands, the Act offers an open-ended, undefined crime which would potentially apply to any communication that someone, including public officials wishing to shut down debate on areas of public interest, could find annoying.'[334]

Comparison with Middle Eastern Regimes

i. The content regulation on telecommunications is similar to the

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[332] United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and the Internet, 2011

[333] Aamir Attaa, PTA Decides to Withdraw SMS Filtration Orders. 22-11-2011. ProPakistani. Url: <http://propakistani.pk/2011/11/22/pta-decides-to-withdraw-sms-filtration-orders/> (Last accessed on 05-04-2016.)

[334] P. 14.

repressive laws in Middle Eastern countries such as Kuwait.

> *"The ... telecommunications law gives the government sweeping powers to block content, deny access to the Internet, and revoke licenses without giving reasons. The government should amend the law to limit the restrictions on telecommunication providers and users to no more than what international human rights law permits."*[335]

ii. The law has been objected to by international human rights organizations, including United Nation. It vests an executive, ministerial body with excessive powers to curb free speech:

> *"Commission for Mass Communications and Information Technology (CMCIT) [has] broad discretionary powers to grant or rescind licenses to companies that provide Internet cable, satellite, and land and wireless phone connections. The commission would begin its work by November 18. The law imposes harsh penalties on people who create or send "immoral" messages, and gives unspecified authorities the power to suspend communication services on national security grounds. Any communication service provider that "contributes" to the dissemination of messages that violate these vague standards can be punished. The law provides no opportunity for judicial review."* [336]

iii. Similar to Pakistan, 'the law allows the commission to grant or refuse licenses to service providers without disclosing the reasons or criteria for its decisions. It can revoke licenses if it decides that the licensee "caused serious harm to others," although the law does not define "serious harm" or provide any guidance as to what this

[335] Human Rights Watch, Kuwait: Telecom Law Violates Free Speech Amend Measure to Meet International Standards. 20-08-2014. Url: <https://www.hrw.org/news/2014/08/20/kuwait-telecom-law-violates-free-speech> (Last accessed on 02-03-2016.)
[336] Ibid.

could entail. The law allows no appeal of a decision to refuse to issue a license or to summarily revoke one.'[337]

Access to Internet & Competition Rules

i. A single, centralized gateway to internet controlled by a single entity, whether governmental of private, creates risks for free speech. Government's control over the access is perhaps more threatening to speech rights as government has the proper coercive apparatus to censor, block, filter or otherwise interfere with exercise of speech and freedom to receive unadulterated information. The trend towards creating such firewalls is popular with regressive regimes such as China, Thailand,[338] etc., where violations of human rights are rampant.

ii. Pakistan currently is considered an 'enemy of the internet'[339] as it has failed to remove following limitations on access to internet:

> *"Obstacles to Access: infrastructural and economic barriers to access; governmental efforts to block specific applications or technologies; legal and ownership control over internet and mobile phone access providers.*
> *Limits on Content: filtering and blocking of websites; other forms of censorship and self-censorship; manipulation of content; the diversity of online news media; and usage of digital media for social and political activism.*
> *Violations of User Rights: legal protections and restrictions on online activity; surveillance and limits*

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[337] Ibid.

[338] In Thailand, it is reported that "the Ministry of Information and Communications Technology was ordered at a September 1 [2015] Cabinet meeting to establish a firewall to filter all Internet traffic entering and leaving Thailand. The written order, signed by Prayuth [the Prime Minister], said the gateway would "serve as a tool to control access to inappropriate sites and the influx of information from abroad," the reports said. Prayuth's order called on authorities to "expedite" the gateway's establishment," Online, Internet gateway plan threatens online freedoms in Thailand. 29-09-2015. Url: <https://cpj.org/2015/09/internet-gateway-plan-threatens-online-freedoms-in.php> (Last accessed on 12-03-2016.)

[339] See Special Report on Internet Surveillance, Focusing on 5 Governments and 5 Companies "Enemies of the Internet," Reporters Without Borders, available at Url: <http://en.rsf.org/special-report-on-internet-11-03-2013,44197.html> ("[G]overnments are increasingly using technology that monitors online activity . . ."); ONI Team, Global Internet Filtering in 2012 at a Glance, Open Net Initiative, 03-04A-2012), http://opennet.net/blog/2012/04/global-internet-filtering-2012-glance ("noting that at least a third of Internet users live in countries with substantive Internet blocking or censorship").

on privacy; and repercussions for online activity, such as legal prosecution, imprisonment, physical attacks, or other forms of harassment."[340]

iii. Currently, the Pakistan Internet Exchange (PIE) is owned by PTCL as a subsidiary. It acts as a clearinghouse of all telecommunication traffic. All the internet service providers in Pakistan are connected to PIE. PTA should have control over PIE, as PTCL is its licensee. Single private owner under international law should not control access to information and internet wholly.

iv. PTA has been vigilant and enthusiastic about finding various means to burden speech and communication services. Many of its draconian and ultra vires have been contested in courts. It has been reported that PTA was forced to withdraw its directive, issued on September 25th, 2012, which formed an international clearing house (ICH) 'under which only Pakistan Telecommunication Company (PTCL) was allowed to terminate all incoming international call'. A centralized gateway was proposed, which under complete control of ICH could handle, operate and maintain 'all incoming international traffic' by PTCL. It violated established principles of competition law and burden speech rights of users calling from abroad. On the direction of Lahore High Court, PTA was directed to abolish the ICH. A complaint was lodged before Competition Commission of Pakistan, challenging the directive under the Competition Act, 2010.[341]

Cyber Crimes

i. It is a compelling government interest to protect citizens from cybercrimes. A National Response Center for Cyber Crime (also referred to as 'NR3C') was established under Federal Investigation Authority (FIA) to respond to cyber crime activities, which includes, hacking, identify theft, computer viruses, financial fraud, etc.[342]

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[340] Freedom House, *Freedom on the Net 2014.* Op. Cit.
[341] 2012 CLD 767.
[342] Official website: www.nr3c.gov.pk/cybercrime.html

The Prevention of Electronic Crimes (PEC) Bill, 2016

i. A cyber crime prevention bill was long under process of review. Human rights activists warned about the proposed bill as violating established norms of free speech, access to internet and information. The Prevention of Electronic Crimes (PEC) Bill, 2016 has been passed by the National Assembly and is being discussed in the Senate. Media experts termed the bill as draconian law. 'The groups advocating freedom of expression and internet freedom consider it as an attack on free expression and open internet in the country. Privacy rights groups have expressed their fearthat the Bill will result in more infringement of privacy of individuals. Constitutional experts believe that various provisions of the Bill are *ultra vires* to the Constitution.'[343]

ii. The PEC Bill/Act directly impacts free speech rights of citizens. The Act defines the term "intelligence" as "any speech, sound, data, signal, writing, image, or video" consistent with PTA Act. "Data" is defined in terms of content and traffic data. "Content data" means "any representation of fact, information or concept for processing in an information system …" The Act also defines "information" as text, message, data, voice, sound, database, video, signal, software, computer programs, codes including object code and source code." As pointed by media experts, 'the most important definitions, that of "personal/private data" and "official data" are missing in the Bill'.[344] Under Section 4, "unauthorised" access to, or copying of, any kind of data, whether public or private, is punishable under the law. Hopefully, judicial interpretation would assume the difference. It is also pointed out that the Act does not differentiate between 'ethical' hacking and 'criminal' hacking, as the latter implies 'infringe[ment] of any security measures'.[345]

iii. According to an expert at Freedom Network, "The law curtails

[343] Muhammad Aftab Alam. The 'unique' aspects of the Cyber Crime Bill 2015. 24-04-2015. Url: <http://tribune.com.pk/story/874751/the-unique-aspects-of-the-cyber-crime-bill-2015/> (Last accessed on 01-04-2016.)
[344] Ibid.
[345] Ibid.

journalists' access to information from the 'sources' which are otherwise accessible even without the presence of right-to-information regime. Criminalizing the leaking of information by whistleblowers is tantamount to infringement of right-to-information and curbs free expression in Pakistan."[346]

iv. Expanding on the mission of PTA to regulate content, Section 34 of the Act allows government to block content:

> *"...if it considers it necessary in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality.*

v. Lack of co- and self-regulation mechanisms create space for such overriding and expansive laws. The law is also feared to reduce the scope of Article 19-A. As pointed out by a media expert:

> *'The Constitution guarantees the citizens' right to information under Article 19A. Transparency, openness and proactive disclosure of information are, nevertheless, fundamental vires of Article 19A [see Chapter 9 for further details]. However, instead of replacing the Freedom of Information Ordinance 2002 with an effective right to information law at the federal level, the government is trying to further discourage transparency and disclosure of information. In fact, the measures proposed in the Bill to restrict disclosure of information make this law no less than a modern version of the Official Secret Act 1923."* [347]

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[346] Web. Rights groups call for overhaul of cyber-crime bill. 24-04-2015. Url: <http://www.dawn.com/news/1177947> (Last accessed on 16-04-2016.) See Guinchard, Audrey, Hate Crime in Cyberspace: The Challenges of Substantive Criminal Law (April 9, 2009). Information and Communication Technology Law, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1375589 or http://dx.doi.org/10.2139/ssrn.1375589

[347] Muhammad Aftab Alam. Op. Cit.

vi. Under the same provisions restricting access to information systems, it is feared that 'a large variety of intelligence or data – relating to the public at large and which is otherwise available through informal sources and that needs to be made public in the public interest — that will no longer be available' under the Act. 'For example, intelligence or data with the government, such as statistics on the situation of markets, estimation of calculations for petroleum prices, speeches of officials/public representatives in meetings, minutes of meetings, videos/images of officials and public representatives in a compromising state, e-copies of the drafts of proposals directly relating to the public, etc. can easily be included in definitions of data and intelligence.'[348]

vii. A patently disproportionate provision, Section 13, "prohibits production, making, generating … any information system, data, or device … believing that it is primarily to be used to commit or to be assisted in the commission of an offence." Defying common sense, it purports to add makers of system and data part of the conspiracy to commit a crime in future about which they have no actual information, with which they have involvement. It is long recognized in all jurisdictions that either the content of contract can be illegal or a valid contract can be illegal if the purpose of it is illegal. Hence, selling a knife is a legal contract; but if it is knowingly sold to commit a crime, then law might also criminalize the seller. All hinges upon judicial interpretation of word belief. It should be held to be intentional. Telecommunication technology is unlike physical items. Its use or abuse may be beyond foreseeability of its creator or seller. The said section is held to be 'against the concept of neutrality of technology and discourages innovation and creativity in the field of information technology'.[349]

viii. The Act has far ranging consequences for free speech and although many of the interests under the Act are legitimate, some are not legitimate and not necessary.

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[348] Ibid.
[349] Ibid.

Recommendations

Problem: 8a. **Jurisdiction:** Overlap in the regulatory jurisdictions of Pakistan Electronic Media Regulatory Authority (PEMRA) and Pakistan Telecom Authority (PTA) create regulatory confusion.

Solution: 8a. The roles and responsibilities of both regulators should be re-examined to clarify regulatory boundaries and duties, while ensuring freedom of expression, right to information, right to privacy and data protection.

Stakeholders: 8a. PEMRA, PTA, Internet Service Providers Association of Pakistan (ISPAK), telecom companies, Ministry of Information Technology, Ministry of Information and Broadcasting, civil society, digital rights groups, representative associations of media owners and workers, and media support groups

Problem: 8b. Protections: Multiple laws in Pakistan authorize surveillance, interception and filtering of communications / content that impose restrictions on fundamental rights including freedom of expression (FOE), the right to information (RTI) and the right to privacy. These laws include: (i) The Telegraph Act 1885; (ii) The Pakistan Telecommunications [Reorganization] Act 1996; (iii) The Electronic Transaction Ordinance 2002; (iv) The Investigation of Fair Trial Act 2013; and (v) The Federal Investigation Agency [FIA] Act 1974.

Solution: 8b. All laws in Pakistan authorizing surveillance, interception and filtering of communications / content should be amended to ensure they are not in contravention of fundamental rights enshrined in the constitution.

Stakeholders: 8b. Parliament, political parties, federal government, PTA, ISPAK, Ministry of Information and Technology, representative associations of media owners and workers, civil society, digital rights groups and media support groups

Problem: 8c. **Autonomy:** PTA is not sufficiently independent and lacks

adequate protection against interference in the exercise of its powers by official actors who retain executive discretion to intervene in the operation of telecom service providers.

Solution: 8c. The PTA Act should be amended to provide strong protections against executive interference in the work of PTA, leaving all regulatory functions in the hands of the regulator alone.

Stakeholders: 8c. PTA, ISPAK, telecom companies, Ministry of Information Technology, civil society, digital rights groups and media support groups

Problem: 8d. Misuse of technology: Modern filtering and surveillance technologies can be dual purpose and help the authorities, and especially government and security authorities, to unlawfully spy on citizens and filter content in violation of fundamental rights.

Solution: 8d. The sale of dual purpose technologies that can be maliciously used for surveillance and filtering by end users should be regulated against unlawful use.

Stakeholders: 8d. Federal government, PTA, ISPAK, Ministry of Information and Technology, civil society, digital rights groups and media support groups

Problem: 8e. **Digital rights:** Existing and proposed new laws, including the Prevention of Electronic Crimes [PEC] Act 2016, relating to curbing cybercrimes contravene free speech and privacy rights, and vest too much power in the executive to criminalise online speech.

Solution: 8e. All such laws, including the proposed PEC Act, should be restricted in scope to electronic/cybercrimes and security of information infrastructure and should not adversely impact RTI. Their application should be subject to judicial oversight instead of executive fiat. Laws should be enacted to provide for the establishment of privacy commissions to protect privacy rights and data protection.

Stakeholders: 8e. Federal government, PTA, ISPAK, FIA, Ministry of Information and Technology, civil society, digital rights groups and

media support groups

Problem: 8f. **Online censorship:** The authorities retain the power to impose complete bans on websites, including social media platforms such as Facebook and YouTube.

Solution: 8f. All laws, including PTA Act, should disallow any blocking of websites except in accordance with a court order issued pursuant to a legitimate law in line with international standards.

Stakeholders: 8f. Federal government, PTA, ISPAK, Ministry of Information and Technology, civil society, digital rights groups and media support groups

Problem: 8g. **Fair competition:** There is no level playing field or competitive telecom and cyberspace regulatory framework. The system gives one actor, the Pakistan Telecom Co Ltd (PTCL), power over its competitors, through its control of the Pakistan Internet Exchange (PIE).

Solution: 8g. The role of PIE as a central clearinghouse for all telecom traffic should be abolished. Control over central clearinghouse functions should be vested in an independent PTA rather than PTCL.

Stakeholders: 8g. Federal government, PTA, ISPAK, PTCL, Ministry of Information and Technology, civil society, digital rights groups and media support groups

CHAPTER 9

ACCESS TO INFORMATION

ACCESS TO INFORMATION

Right to information legal framework, secrecy, whistleblower protection

Why Right to Information?

i. Access to information, or right to information (RTI), refers to the right of individuals to access information held by public authorities. As such, it is part of 'information rights' which include 'rights to create and communicate information (e.g., freedom of expression, freedom of association), to control others' access to information (e.g., privacy and intellectual property), and rights to access information (e.g., freedom of thought, the right to read). Some information rights have been recognized as human rights in international instruments (e.g., Universal Declaration of Human Rights, Declaration on the Rights of the Child, Declaration on the Rights of Indigenous People)'; and are considered necessary for a 'minimally good' life.[350] Beyond doubt, right to information is now considered a fundamental human right, recognized by the Constitution of Pakistan, 1973, under Article 19-A, which states:

> ***"19A. Right to information:*** *Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."*

ii. It is not merely a power-conferring rule a 'liberty right', but one that creates positive obligations on the state to protect and provide for these rights as it affects welfare of people. The basis for that lies in human nature and right to know and the instrumental benefits of knowledge. Moreover, right to information empowers people to keep a check on the state, and that whatever information government creates is all in all property of the citizens. It is another matter that certain public and private interests justify non-

[350] Mathiesen, Kay, Access to Information as a Human Right (September 7, 2008). Available at SSRN: http://ssrn.com/abstract=1264666 or http://dx.doi.org/10.2139/ssrn.1264666

disclosure in certain situations, which should be narrow and not broad.

iii. Access to information laws were first acknowledged and put on statutory footings in 1997 with the promulgation of Freedom of Information Ordinance by the then interim government, which was not enacted by the subsequent government of then Prime Minister Mian Muhammad Nawaz Sharif.[351] Then, in 2002, the Freedom of Information Ordinance was passed, which had the basic elements that right to information legislation should have, along the lines of the Freedom of Information Act, 1966 of United States, Right to Information Act, 2005 of India, etc.

iv. The major impediments to effective right to information law and enforcement in Pakistan, as we would analyze, remain to be restrictive legislation, uneven public awareness, executive hostility towards disclosure, lack of innovation, poor review systems, dysfunctional complaint systems, lack of proactive disclosure, poor planning, incompatible connected legislations, and such related inefficiencies. If the purpose of right to information law is to eliminate inefficiency in obtaining information and corruption from government departments, to control bureaucracy's power and empower weak and marginalized classes, then the right to information law is a poor law as it exists in Pakistan. Further, the dilemma is it's a known unknown, i.e., there is hardly objective assessment of citizen's experience of the law, either by government or private sector, let alone outcry over denial of constitutional guarantees, by and large.

Right to Information: Legal Instruments

i. Right to information is not only recognized under the Constitution, but has been implemented at federal and provincial level as well. We will analyze the content and enforcement of the legal instrument vis-à-vis settled international standards. At the outset,

[351] For chronological history of legislative developments on right to free speech see, History of Freedom of Information Legislation in Pakistan, Shehri. Url: <http://shehri.org/rti/history-of-freedom-of-information-legislation-in-pakistan.html> (Last accessed on 02-03-2016)

we would like to point out that although wording of the statutes and substantive provisions granting rights or curbing it that are 'necessary' for effective law, however, it is by no means 'sufficient' in a democracy like Pakistan. Therefore, it is not just the wording of the statutes that ensure protection and guarantee of rights; it is the political will and institutional mechanisms, along with judicial oversight, that make the laws effective – at least this is the case with right to information laws in countries like India and Pakistan.[352]

ii. Freedom of Information Ordinance, promulgated in 2002, was enacted at federal level. Later on, provinces followed suit, Balochistan enacted the Balochistan Freedom of Information Act in 2005 and Sindh promulgated the Sindh Freedom of Information Act in 2006.[353]

Freedom of Information Ordinance, 2002

i. Freedom of Information Ordinance, 2002 (henceforth referred to as 'FOI, 2002') was promulgated along with the Freedom of Information Rules, 2004 (henceforth referred to as 'FOI, Rules') which provided the procedure for filing a request for record under the FOI, 2002. We will analyze the primary ordinance and sub-ordinate rules side-by-side.[354]

Substantive Rights & Exceptions to Access under FOI, 2002

i. The preamble of the Ordinance aims to 'provide for transparency and freedom of information to ensure that the citizens of Pakistan have improved access to public records and for the purpose to make the Federal Government more accountable to its citizens…' It lays down normative aspects of RTI law explicitly, and when read with Article 19-A of the Constitution of 1973, creates strong

[352] For detailed analysis of effectiveness of RTI law in India, see Roberts, Alasdair S., A Great and Revolutionary Law? The First Four Years of India's Right to Information Act (March 12, 2010). Public Administration Review, Vol, 70, No.6, November/December 2010. Available at SSRN: http://ssrn.com/abstract=1527858

[353] The Sindh Local Government Ordinance 2001, Section 137, states: "1) Every citizen shall have the right to information (RTI) about any office of the district government, municipal administration and union administration; 2) Every office shall provide requisite information, if not restricted under any law for the time being in force, on the prescribed forms and on payments of such fees as many as prescribed."

[354] In jurisprudence and legal theory, it is well recognized that laws are not just valid or invalid, rather law is a matter of 'degree' as well, which simply means that it has an 'inner procedural morality' of itself, which if not followed would render it practically as 'bad' law, valid or not. Hence, the rules of business are often as important as substantive rights.

presumption towards disclosure of information, and indicates that constitutionality of laws, rules and practices of state functionaries restricting free access may be invalid. In similar vein, Section 3 does not qualify disclosure and creates heavy presumption in favour of disclosure of information at the 'lowest reasonable cost'.

ii. At the same time, the FOI, 2002 strictly excludes a broad range of sources and types of information from public access in lieu of balancing many legitimate, competing interests. Section 3 of the Ordinance excludes overriding effect of 'any other law'; whereas Section 23, contradicting Section 3, requires the rights under the Ordinance not to derogate from 'anything contained in any other law'. Sections 8 and 14 to 18 govern specific exceptions to RTI requests, including threat to foreign relations of Pakistan, law enforcement, personal privacy and economic and commercial affairs. It also protects the confidential source of information under Section 16(c) – a right not extended to journalists.

iii. While there are many legitimate interests protected under the said Sections, legislature has given government opportunity to skirt the constitutional guarantee under Article 19-A by excluding any documents termed as 'classified' or 'excluded from the purview' by Federal Government under Sections 8(f) & (i). Such expansive provisions, without narrow qualifications, vest executive with too much authority to achieve indirectly what cannot be achieved directly under the constitution. However, judicial interpretation can reduce the risk of misuse of broadness of the law creating exceptions. Similarly, opinions from other departments are usually disclosed in established democracies, which are excluded under Section 8(c). Moreover, it is not clear what kind of files and what type of noting should not be excluded, under Section 8(a). Privacy is also recognized to be a legitimate interest to be protected.[355]

[355] See Banisar, David, The Right to Information and Privacy: Balancing Rights and Managing Conflicts (March 10, 2011). World Bank Institute Governance Working Paper. Available at SSRN: http://ssrn.com/abstract=1786473 or http://dx.doi.org/10.2139/ssrn.1786473.

iv. The right to access is limited to requesters who are citizens of Pakistan, under Section 12. There are no special, explicitly provisions for discriminated and disadvantaged classes such as illiterate, rural communities, special people, etc.[356]

v. Neutral observers have held the exceptions provided under the Ordinance to be devoid of any serious restrain on free access to information. Center for Law and Democracy in its elaboration of exceptions under international norms, notes, as a key standard:

> *"The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities."*[357]

Range of Application

i. The Ordinance is applicable to broad range of materials, or 'records', as defined under Section 2(i), which is inclusive of wide-range of form of material, and the content. The Ordinance does not limit its application to certain organizations but under Section 2(h) includes record produced by all kinds of public bodies, which include statutory bodies, including all executive & administrative departments, but does not mention private organizations performing 'public functions', including profit-making organizations.[358] Nor does it mention organizations that receive grants from government.[359] It does not define special categories of

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[356] However, Section 9 requires public bodies to 'take necessary steps' to assist requesters, which includes in its ambit special needs of requesters.

[357] Center for Law and Democracy. Global Right to Information Rating: Country, Pakistan. Url: <http://www.rti-rating.org/view_country?country_name=Pakistan> (Last accessed on 19-03-2016.)

[358] In United Kingdom, judicial review is possible against such organizations.

[359] Hopefully, judicial intervention would broadly interpret the clauses and bring such important organizations within its fold. We could not identify a single case on this aspect.

the departments. Moreover, it gives rise of a presumption of disclosure of information of a third party possessed by public bodies, or non-statutory bodies created by public officials. Curiously, the Ordinance excludes by omission security agencies and forces, which is against international norms.

ii. A request can be made for information, or obtaining copies of the record in various forms, such as electronic and physical, depending upon the nature of material. The request has to be put in writing. The Ordinance does not guide in detail about writing and filing process, however a sample request form is given as Annexure 2 under the FOI, Rules, which requires requesters to give reasons for their request, which is against the standards. Ordinance makes it incumbent on the public bodies to assist requesters and 'take necessary steps', under Section 9. Upon request, there is no mechanism of providing receipts; nor are officials required to comply with specific requests, such as form of delivery of information, made by requesters. The Annexure 2 severely restricts the use of information by not allowing use of information for any other purpose.

iii. The timeframe for responding to requests is given under Section 13, which makes it mandatory to reply to requests within twenty-one (21) working days – whether to provide information or refuse to. The refusal to give information has to be put his 'decision' in writing under Section 13(3). It should be judicially interpreted to be a 'reasoned' order, to reduce culture of arbitrariness. However, there is no judicial precedent to that effect. The fee for request is Rs. 50; cost of photocopies is Rs. 5 per page, for copies above twenty (20) pages free of charge. Section 25(a) gives Federal Government, not the individual bodies, to determine fees.

iv. Given the broad nature of excluded information, the Ordinance does not obligate government to update the list of excluded materials, whenever the reasons for its exclusion cease to exist. Nor is there specific, detailed provision for sophisticated management of record.

Review & Oversight Mechanisms

i. The Ordinance did not create an independent 'information commission' specifically established to hear appeals against decisions of public bodies on grant or refusal of requests, with the power to make structure and institutional changes, and create binding judicial precedent to provide for interpretation of statutes. Such a robust system is missing in Pakistan.

ii. Rules 6 of the FOI, Rules provides for a complaint mechanism system, which empowers requesters to file complaints before the head of the concerned public body. The complaint must be disposed of within thirty (30) days of its receipt. Section 19 of the FOI, 2002 provides for first instance complaint, as well as an appeal mechanism to complaints lodged before the head of the concerned public body, before the Mohtasib or the Federal Tax Ombudsman, as the case may be, which are independent bodies. There is no time limit for disposal of the case in the FOI Ordinance, 2002.

iii. The applicable statute is the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983. The structure and powers of the said institution compromises the protection of access to information. The Mohtasib is a generic institution, the independence of which is questionable, as it comes under direct control of the President. There are no special provisions under the Order of 1983 for non-political and non-partisan appointments. The tenure of the head of the organization is not protected, although judicially reviewable.[360]

iv. The reviewing commission should be robust and have broad powers to search and investigate the premises of bodies under review. Its decision should be legally binding.[361] The statute fails to penalize offences of misconduct of officials, appropriately. Section 21 only criminalizes destruction of documents which 'was the subject of a request, or a complaint'. Nor are there any provisions to protect people against frequent or continuous denial of access to information.

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[360] Under Section 6(2) of the Order of 1983.

[361] Although Mohtasib has power to search and investigate under Sections 14 to 16, its decisions are not legally binding.

RTI: Provincial Legislation

i. Subsequent to FOI, 2002, provinces followed suit and enacted its own right to information legislations. Balochistan and Sindh adopted the federal legislation in 2005 and 2006, respectively, with hardly any amendment. Punjab and Khyber Pakhtunkhwa, each with its own legislation, greatly improved upon the FOI, 2002 in terms of bringing the content of the law and the institutional framework in line with international standards in 2013. We will briefly talk about the new provisions adopted under the said legislations.

Punjab Transparency and Right to Information Act, 2013

i. The Punjab Transparency and Right to Information Act, 2013[362] (Act XXV of 2013) (henceforth referred to as 'PRTI Law' along with the Punjab Transparency and Right to Information Rules, 2014 (henceforth referred to as 'Rules of 2014'), have greatly improved upon federal legislation. The key reforms achieved by the said legislations are institution of much clearer, detailed law; further obligation of government for proactive disclosure; information commission with more effective and clear complaint and review system, among others.

ii. The PRTI Law expands scope of definitions of key terms. For instance, Section 2(vii) brings into the fold of the Act 'a non-government organization substantially financed by the Government or a local government'. Similarly, definition of 'record' has been expanded. Moreover, right to information has been clearly defined to include taking notes, obtaining certified copies, etc. It also introduces 'public information officials'. The most important reform may be the definition of complaint, which now includes various kinds of actus rea within the ambit of denial of right to information, Section 2(d) states:

'(d) "complaint" means a complaint made, in writing,

[362] Promulgated on 16-12-2013.

to the Commission by an applicant on one or more of the following grounds:-

(i) wrongful denial of access to information;
(ii) non provision of information within the stipulated time;
(iii) refusal to receive and process the request from an applicant;
(iv) furnishing false, misleading or incomplete information;
(v) charging fee or cost for provision of information in excess of the requisite fee;
(vi) deliberate destruction of information to avoid its disclosure;
(vii) failure of a public body to implement the provisions regarding proactive disclosure; or
(viii) violation of any other provision of the Act by a public body;'

iii. Section 4 of the PRTI Law requires public bodies to 'proactively disclose' certain official information, not covered under FOI, 2002. Much of the information is generic and does not in any way help people to curb corruption.[363]

iv. An independent information commission is established under Section 5 of the Act, appointing three information commissioners, with clear provisions for their tenure. The commissioners can only be removed for misconduct and are given opportunity of hearing and defense before a provincial parliamentary committee. The commission is given powers of a 'civil courts' and its decisions are binding. Section 14 provides for allocation of funds to be provided by government, along with a secretariat and staff.

v. The application procedure given under Section 10 is detailed and clear and has increased preferences available to the requester, as well as special provision for disadvantaged applicants. The

[363] Some of the more helpful information includes budgets, allocation of funds to other bodies, '(g) a directory of its officers and employees with their respective remuneration, perks and privileges', decision making processes, '(j) particulars of the recipients of concessions, permits or authorizations granted by the public body' and '(k) facilities available with the public body for obtaining information held by it'.

response time is up to fourteen days (Section 10(7)). Public Information Officer (PIO) is also required to give reasons for not providing the information Section 13(4). Option to transfer application and internal review mechanisms are also provided.

vi. The Act has increased the counts of offences under Section 16, which penalizes 'any person who destroys a record which at the time it was destroyed was the subject of an application for access to information, internal review or complaint, or otherwise obstructs access to information which is the subject of an application, internal review or complaint, with the intention of preventing its disclosure under the Act, commits an offence punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than ten thousand rupees or with both.'

Khyber Pakhtunkhwa Right to Information Act, 2013

i. The Khyber Pakhtunkhwa Right to Information Act, 2013[364] (Act No. XXVII of 2013) (henceforth referred to as 'RTIA') is perhaps the finest of all freedom of information laws in Pakistan. It simplifies the definitions and procedures giving broadest meanings to provisions improving access to information, while at the same time limiting the scope of exceptions and restrictions. Apart from that, there is not much substantive difference between RTIA and PRTI Law.

ii. The Preamble of the RTIA refers to Article 19-A; and further establishes normative, democratic and utilitarian underpinnings of the RTI jurisprudence. When it comes to defining key terms, the law is generous towards broadening the scope of rights. Instead of enumerating what kinds of complaints may be made, for instance, thereby specifically excluding others, under the law a complaint can be 'any allegation in writing made by or on behalf of a requester that his request for information has not been dealt with by a public body in accordance with the rules and procedures set out in this Act,

[364] Promulgated on 05-11-2013.

including where he has been wrongfully denied access to all or part of that record'.[365]

iii. Similarly, information can be anything under this sun, as Section 2(e) states, "'information' means material which communicates meaning and which is held in recorded form'; record means 'information which is recorded in any form' (Section 2(j)); public body, unlike other laws, it specifically includes secretariats of Chief Ministers and Governor of the province (Section 2(i) (ii), as well as private bodies 'which undertakes a public functions' (Section 2(i) (viii)). Moreover, Section 2(m) also defines "third parties" which may be holding the information or have their information held by government.[366]

iv. Procedure for filing requests is clear and provides greater assistance to filers, such as providing writing and receipt facilities. The law designates a special officer for receiving requests under Section 10(1). Timeliness of responding to request is also provided, capping the time limit of response at ten working days (Section 11). There are no fees for filing requests. People below poverty line are exempted for paying; those who can, are not charged for copies up to twenty pages.

v. When it comes to providing exceptions to record available for inspection or review, the law is far better than the rest of legislations. Provisions for secrecy and confidentiality of documents are exploited in Pakistan. Section 14(a) states:

> *"(a) exceptions in other laws (secrecy provisions) may not extend the scope of the exceptions in this Act, although they may elaborate on an exception that is provided for in this Act…"*

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[365] Section 2(a).

[366] Section 22 states: "Third parties. (1) Where a request for information relates to information or a record provided on a confidential basis by a third party, the public body shall endeavour to contact that third party with a view to obtaining either his consent to disclosure of the information or record or his objections to disclosure. (2) Where a third party objects to disclosure, his objections shall be taken into account, but the decision as to whether or not the information falls within the scope of the exceptions in this Act shall be assessed by the public body on the basis of objective considerations."

vi. Other laws do not require government to provide partial information or record, while excluding classified parts. Section 14(f) stipulates de-classification of all documents after 20 years further extendable to maximum of 15 years in exceptional circumstance with the approval of information commissioner. Similarly, the law's another important contribution is as following:

> ***"Section 14 …*** *(d) even where information falls within the scope of an exception provided for in this Act, the information shall still be provided to the requester where, on balance, the overall public interest favours disclosure of the information;*
>
> *(e) for the purposes of clause (d), there shall be a strong presumption in favour of the disclosure of information that exposes corruption, criminal wrongdoing, other serious breaches of the law, human rights abuse, or serious harm to public safety or the environment; ..."*

vii. An information commission similar to PRTI Law is established under the law and has been functional since 2014. It is given the power of making and presenting its own budget to the government (Section 20(3)). Moreover, the RTIA also protects whistleblowers. Section 30 of the law states:

> ***"Section 30. Whistleblowers.*** *(1) No one may be subject to any legal, administrative or employment related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.*

(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body."

Impediments to Effectiveness of RTI Law

The Official Secrets Act, 1923

i. Right to information law is compromised by contradicting and overriding statutes, which are inherently against free and open access to information. The primary secrecy operative in Pakistan is original United Kingdom's Official Secrets Act 1923, which puts expansive restrictions on the disclosure of classified information. Under the Act of 1923, a 'declassification Committee' which designates documents as classified. The modus operandi of the Committee is shrouded in mystery and vests it with too much discretion to classify documents with no judicial or parliamentary oversight. There is plethora of other laws which have not been modified after FOI, 2002 or provincial laws. For instance, Qanun-e-Shahdat Order or the Law of Evidence of 1984 stipulates that no government official can be compelled to give information 'when he considers that the public interest would suffer by disclosure'. Such laws include the Security of Pakistan Act 1952, the Maintenance of Public Order Act 1960, the Defence of Pakistan Rules, Protection of Pakistan Ordinance 2014 and various provisions of the Penal Code.

ii. Provisions of such laws do not conform to international standards of providing clear laws with legitimate and necessary aims.

Analysis of User's Behavior

i. There is currently a dearth of full-fledged government or private-sector review of use and enforcement of the right to information laws at federal and provincial levels. We have provided an analysis of the legal provisions. Equally important is the conduct of the

officials, and whether the officials internalize the rules and apply the law in its true letter and spirit. It can be achieved by constant, neutral and objective monitoring of the officials and the process of requests and complains. The problem exists both on 'demand' side (i.e. requests by citizens) and on 'supply side' (i.e. government's service).

ii. The factors for effectiveness of an RTI law also lie in public awareness of the law, behavior of public officials, planning for providing information, innovation, management systems, economic costs of transactions, training of PIOs, treatment of disadvantaged groups such as marginalized genders, illiterates, poor people, etc. A comprehensive report analyzing studies conducted by globally recognized organizations in India[367] found out how people, especially of rural background, are afraid even to ask for information, and are scolded by officials. The attitude of officials is often haughty and indifferent. Those officials who wish to share information face backlash from their higher-ups and are afraid of being marginalized within the organization. Even though appeal and review process is given in the law. The effort and resources one has to put in the process is often dissuading.

iii. The dismal situation of the RTI laws' enforcement in Pakistan is obvious from the fact that the departments have not been overwhelmed with requests for information. For instance, Khyber Pakhtunkhwa in past three years has only received around handful of requests; only 10 show cause notices have been issued[368]; seven fines have been imposed along with reasoned orders by Information Commission.[369] It has not been studied what types of requests people demand for, nor is there analysis of overall experience of the users.

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[367] Roberts, Alasdair S., A Great and Revolutionary Law? The First Four Years of India's Right to Information Act (March 12, 2010). Public Administration Review, Vol, 70, No.6, November/December 2010. Available at SSRN: http://ssrn.com/abstract=1527858

[368] RTI Commission, Show Cause Notices. Url:
<http://www.kprti.gov.pk/rti/page.php?PageId=72&MenuId=11> (Last accessed on 02-03-2016.)

[369] RTI Commission, Orders by the Commission. Url:
<http://www.kprti.gov.pk/rti/page.php?PageId=73&MenuId=11> (Last accessed on 04-03-2016.)

iv. Digitalization of government records can significantly improve the RTI law effectiveness. It would make share and access of information much cost effective. Internet penetration remains a problem at demand end of users.

Whistleblowers' Protection

i. Whistleblower protection is especially in the context of Pakistan, where corruption and abuse of power are evidently higher than most democracies. There is little incentive for powerless employees to leak critical information. The political and institutional backlash is too immense to provide such an incentive.

ii. There is no general whistleblower protection law in Pakistan at the federal level. The FOI Ordinance contains no provisions to that effect either in the public interest. As noted above, only the Khyber Pakhtunkhwa Right to Information Act, 2013 contains a provision for protection to whistleblowers. It has to be complemented with new comprehensive whistleblower protection law, which is under process at Federal level.

Recommendations

Problem: 9a. **Federal-level RTI:** At the federal level, there is an FOI [freedom of information] law rather than RTI [right to information] law, which fails to measure up to international standards.

Solution: 9a. The law at the federal level should be replaced with a proper RTI law in line with Article 19A of the Constitution and international standards.

Stakeholders: 9a. Federal government, civil society, representative associations of media owners and workers and media support groups

Problem: 9b. **Provincial-level RTI:** While Khyber Pakhtunkhwa and Punjab provinces have proper RTI laws in place, Balochistan and Sindh provinces have weak FOI laws, which fail to measure up to international standards.

Solution: 9b. The FOI laws in Balochistan and Sindh provinces should

be replaced with proper RTI laws in line with Article 19A of the Constitution and international standards.

Stakeholders: 9b. Provincial governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups

Problem: 9c. **Other regional level-RTI:** No RTI laws have been put in place for Federally Administered Tribal Areas and Provincially Administered Tribal Areas (FATA/PATA), Azad Kashmir (AJK) and Gilgit-Baltistan.

Solution: 9c. Proper RTI laws should be enacted in line with Article 19A of the Constitution and international standards.

Stakeholders: 9c. Federal, provincial and regional governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups

Problem: 9d. Secrecy laws are an impediment to the effectiveness of RTI laws and the sharing of information in all provinces and regions in Pakistan.

Solution:9d. Secrecy laws should be reviewed and amended to bring them into line with the standards in the new transparency laws and international standards in this area.

Stakeholder: 9d. Federal, provincial and regional governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups

Problem: 9e. The extent of digitisation of records by public bodies is low and there is limited proactive disclosure of information by them, especially online. There are no legal provisions for regions other than Khyber Pakhtunkhwa and Punjab provinces in the whole of Pakistan for proactive disclosure of information.

Solution: 9e. Public bodies in all territories of Pakistan should allocate more resources to the digitisation of records while central authorities should adopt clear policies in this area and also provide support to public bodies to achieve this task. Territories in Pakistan other than Khyber Pakhtunkhwa and Punjab should incorporate provisions on proactive disclosure into their RTI laws.

Stakeholders: 9e. Federal, provincial and regional governments, civil society, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups.

Annexures

Annexure -I:
AGENDA FOR MEDIA REFORMS – Key Challenges and Solutions

The following is a consolidation of the key findings and recommendations from each of the chapters above

Key Problems/findings	Recommendations	Stakeholders
CHAPTER 2. FREE SPEECH - CONSTITUTIONAL FRAMEWORK OF PAKISTAN *Comparing with international/regional standards of free expression*		
2a. Freedom of expression (FOE), as defined in Article 19 of the Constitution, is restrictive and falls short of international FOE standards.	2a. Article 19 should be revisited with a view to narrowing restrictions and reflecting official commitments made by the State of Pakistan, including in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).	2a. Federal government, parliament, political rights, civil society, representative associations of media owners and workers, and media support groups
2b. Contempt provisions as defined in Article 204 of the Constitution restrict free speech and fair comment.	2b. Constitutional provisions governing contempt and contempt of court laws should be reviewed so as to limit discretion in favour of free speech.	2a. Federal government, parliament, political rights, civil society, representative associations of media owners and workers, and media support groups
2c. Laws and provisions discouraging free speech impair pluralism.	2c. Undue restrictions in the legal framework for free speech should be removed and provisions relating to pluralism and freedom of expression in the Constitution should be proactively enforced.	2c. Federal government, representative associations of media workers and media owners, civil society organisations, lawyers and media support groups

Key Problems/findings	Recommendations	Stakeholders
CHAPTER 3. JOURNALISTS' RIGHTS ***Employment, working rules, jobs, safety regulations, source protection, rules and systems of accreditation***		
3a. Specific labour law regime relating to working journalists [Newspaper Employees Condition of Service Act, (NICOSA) 1973] is restricted to the print media and is out-dated.	3a. Relevant federal and provincial labour and related laws should be reviewed by a law reforms commission and amended to: (i) bring them into line with modern standards on employment, compensation and human resource development, including standard contracts and in-house professionalism trainings; (ii) embrace the post-18th Amendment devolution framework (both federal and provincial legislation); and (iii) extend them to print, electronic and online media.	3a. Federal and provincial governments, representative associations of media owners and media workers, lawyers and media support groups
3b. There are no clear legal rules regarding protection of sources.	3b. The law of evidence should be reviewed and provisions on source protection for journalists should be introduced into this body of law in line with international law and best practices.	3b. Federal government, representative associations of media workers, media owners, judiciary, lawyers and media support groups
3c. There is no legal protection for whistleblowers.	3c. A whistleblower protection law should be adopted which provides protection against sanction for those who expose wrongdoing.	3c. Federal government, representative associations of media workers and media owners, civil society organisations, lawyers and media support groups

Key Problems/findings	Recommendations	Stakeholders
3d. There are high levels of impunity in cases of attacks or threats of attacks against journalists and no special legal measures or frameworks to address this.	3d. Special rules should be put in place – of both a legal and policy nature – which provide for the establishment of special prosecutorial offices in Islamabad and the four provincial capitals to investigate cases of attacks against journalists and media houses, to institute legal cases against those responsible and to expedite prosecution. These offices should benefit from guaranteed adequate annual budgets for the prosecutors.	3d. Federal and provincial governments, national and provincial legislatures, political parties, representative associations of media workers and owners, UN, media support groups and civil society
3e. Media houses have generally failed to put in place adequate systems for protecting media workers against attacks and threats of attacks, especially for those reporting from conflict areas and who are otherwise subject to pressure and coercion. This includes: (i) inadequate training and access to equipment; (ii) poor information sharing and security alert systems; and (iii) absence of support resources.	3e. Media houses should have defined safety policies for all media practitioners that offer: (i) specialised training (e.g., conflict sensitive journalism), including physical and digital security training, and access to appropriate security equipment; (ii) an administrative threat response and security alert mechanism providing liaison and coordination between representative platforms of media practitioners and local security authorities; and (iii) systems to provide adequate support to media practitioners most at risk, including emotional well-being care, insurance and compensation schemes.	3e. Federal, provincial and district governments, representative associations of media workers and owners, and media support groups

Key Problems/findings	Recommendations	Stakeholders
3f. The system of accreditation for journalists is not professionally designed or managed.	3f. A policy should be adopted which provides for clear, fair and uniform system of accreditation for journalists across Pakistan.	3f. Representative associations of media workers and owners, and media support groups
CHAPTER 4. PRINT MEDIA REGULATIONS ***Provisions in general laws affecting the print media as a sector***		
4a. Registration, declaration and renewal processes amount to informal licensing and even prior censorship while the executive is vested with expansive powers to investigate, search, seize and destroy publications without judicial oversight or authorisation.	4a. The registration regime of print publications should be drastically simplified to the following principles: (i) the system of declarations should be done away with. Registration should be transformed into a purely technical process requiring no permission and no executive discretion to refuse registration; and (ii) the system should be overseen by the general registrar of companies. At a minimum, the executive should not exercise any regulatory power over the media and any body that does should be protected against political interference.	4a. Federal and provincial governments, representative associations of media workers and owners, civil society and media support groups
4b. Prior restraints and disproportionate criminal and civil restrictions on the content of what is allowed to be published continue to apply.	4b. All laws which impose restrictions on the content of what may be published should be reviewed and amended to bring them into line with international standards.	4b. Federal and provincial governments, representative associations of media workers and owners, civil society and media support groups

Key Problems/findings	Recommendations	Stakeholders
4c. Lack of a central code of ethics for media and an ineffective and insufficiently transparent complaints mechanism to deal with public complaints about print media content.	4c. A national dialogue with key stakeholders should be held to reform the system of complaints so as to create an appropriate and effective mechanism (whether self-regulatory or co-regulatory nature). This new mechanism should include a central code of conduct to be developed for and endorsed by the media sector.	4c. Representative associations of media workers, managers and owners, and media support groups
4d. Unrealistic limitations on ownership, cross-ownership and foreign ownership of the media.	4d. The rules in this area should be reviewed and amended so as to provide for a realistic system for preventing undue concentration of media ownership and undue foreign ownership while allowing for investment in and growth of the sector.	4d. Federal and provincial government, representative associations of media owners and workers, civil society, media support groups and lawyers
CHAPTER 5. PRIVATE SECTOR BROADCASTING ***Regulatory structure, licensing, oversight, ownership, competition, digitalization, diversity/pluralism***		
5a. PEMRA lacks the independence required under international law of bodies which regulate the media in terms of both its members and its organisational structure.	5a. The structure and membership of PEMRA should be substantially revised so that it is structurally and functionally independent of the executive as well as of commercial media outlets (with representation of key stakeholders and professionals, and including gender and minority group representation), including, among other things, by putting it under parliamentary oversight.	5a. PEMRA, federal government, representative associations of media owners and workers, media support groups and civil society

Key Problems/findings	Recommendations	Stakeholders
5b. The reservation of the terrestrial space exclusively for the State broadcasters and the failure to take advantage of the opportunities offered by the digital transition.	5b. The process of switching over to digital broadcasting should be continued with the support of an appropriate legal and policy environment, and the airwaves should be opened up to private broadcasters.	5b. PEMRA, federal government and media support groups
5c. Excessive restrictions on the content of what may be broadcast, along with unduly heavy-handed application of these rules.	5c. The rules on content should be reviewed and amended so as to bring them into line with international standards in this area, including by removing vague and unduly intrusive restrictions. The possibility of a co-regulatory system for content-related complaints should be explored.	5c. PEMRA, federal government, representative associations of media owners and workers, civil society and media support groups
5d. The rules fail to provide adequate protection against possible abuses of dominant positions of media owners in broadcasting.	5d. Clear and specific anti-competition or undue concentration of media ownership rules should be developed, including in relation to foreign ownership of the media.	5d. Competition Commission, PEMRA, federal government, representative associations of media owners and workers and media support groups
5e. Undue self-allocated government quota on air time and lack of adequate community access to air time.	5e. The power of the government to provide for the allocation of 10% of the total air time of networks should be done away with and instead this time should be allocated to community interest groups representing marginalised segments of society (such as children, women, minorities, persons with disabilities, etc.).	5e. Federal government, PEMRA, representative associations of broadcasters and media workers, consumer groups, civil society and media support groups

Key Problems/findings	Recommendations	Stakeholders
5f. An absence of appropriate rules to promote media diversity, including the licensing of community broadcasting, leading to a lack of community-owned broadcast media.	5f. The rules regarding licensing should be reviewed to ensure that appropriate safeguards are included to promote media diversity. As part of this, the rules should provide for a system for licensing community broadcasters, in particular community radios, and to ensure an equitable reservation of frequency for this broadcasting sector.	5f. Federal government, PEMRA, civil society, representative associations of special interest community groups and media support groups
CHAPTER 6. PUBLIC SECTOR BROADCASTING ***Principles of public service broadcasting, Pakistan's public service broadcasters (PTV, PBC, APP) – independence, mandate, public funding, transparency***		
6a. **Independence:** Public sector media comprising Pakistan Broadcasting Corporation (PBC), Pakistan Television (PTV), Shalimar Recording and Broadcasting Company, (SRBC) and Associated Press of Pakistan (APP) are under firm government ownership and control, including editorial control. PBC and APP are statutory bodies while PTV and SRBC are public limited companies.	6a. All public sector media should be regulated by a law which is guided by best practice principles regarding public service broadcasting. The law should effectively protect public sector media from government control and guarantee their editorial interference by ensuring that oversight is undertaken by parliament.	6a. Government, parliament, political parties, PBC, PTV, SRBC, APP, civil society and media support groups
6b. **Mandate:** The stated mandates of all public sector media are vague and open to wide interpretation.	6b. The mandates of all public sector media should be set out in clear, concise language in law, based on principles of public service media. There should be guaranteed compliance with these mandates and principles.	6b. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

Key Problems/findings	Recommendations	Stakeholders
6c. **Funding:** The public sector media suffer from acute dependence on government funding, undermining its independence.	6c. Funding and budget of all public sector media should be delinked from administrative and editorial controls, while arbitrary withdrawal or reduction in funding should be prohibited.	6c. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups
6d. **Accountability:** The public sector media are not subject to uniform, effective mechanisms of transparency and accountability.	6d. All public sector media should have uniform, effective mechanisms of transparency and accountability, including mandatory annual reporting to the parliament and audits of their accounts by independent, approved auditors. Independent advisory councils should be established for these public sector media to provide direct audience feedback, and complaints systems established to deal with public complaints.	6d. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups
6e. **Pluralism:** Lack of clear policy and consistent practice promoting pluralism.	6e. A uniform policy for all public sector media should be drafted and adopted guaranteeing accommodation of pluralism including the allocation of a specified percentage of airtime and space for community interest groups representing marginalised segments of society (such as children, women, minorities, persons with disabilities, etc.).	6e. Federal government, parliament, political parties, PBC, PTV, SRBC, APP, civil society, media support groups

Key Problems/findings	Recommendations	Stakeholders
CHAPTER 7. MEDIA CONTENT REGULATIONS ***Offline, online, on air (electronic and print media and internet) content restrictions, defamation, penal provisions, contempt, code of conduct***		
7a. **Censorship:** Broad, vague content restrictions, including in laws, from both the colonial and post-colonial periods unduly limit what can be published, broadcast or communicated online.	7a. A wide-ranging review of all content restrictions in different laws should be conducted and these restrictions should be repealed or amended, as necessary, to bring them into line with international standards.	7a. Federal government, parliament, political parties, representative associations of media owners and workers, civil society, Law and Justice Commission of Pakistan and media support groups
7b. **Contempt:** The contempt of court law unduly restricts fair commentary on judicial processes, court judgements and conduct of judges.	7b. The contempt laws should be reviewed to remove arbitrariness in favour of free speech.	7b. Federal government, parliament, political parties, representative associations of media owners and workers, civil society, Law and Justice Commission of Pakistan and media support groups
CHAPTER 8. MEDIA INTERMEDIARIES – TELECOM and INTERNET ***Structures, internet access, online free speech, online censorship***		
8a. **Jurisdiction:** Overlap in the regulatory jurisdictions of Pakistan Electronic Media Regulatory Authority (PEMRA) and Pakistan Telecom Authority (PTA) create regulatory confusion.	8a. The roles and responsibilities of both regulators should be re-examined to clarify regulatory boundaries and duties, while ensuring freedom of expression, right to information, right to privacy and data protection.	8a. PEMRA, PTA, Internet Service Providers Association of Pakistan (ISPAK), telecom companies, Ministry of Information Technology, Ministry of Information and Broadcasting, civil society, digital rights groups, representative associations of media owners and workers, and media support groups

Key Problems/findings	Recommendations	Stakeholders
8b. **Protections:** Multiple laws in Pakistan authorize surveillance, interception and filtering of communications / content that impose restrictions on fundamental rights including freedom of expression (FOE), the right to information (RTI) and the right to privacy. These laws include: (i) The Telegraph Act 1885; (ii) The Pakistan Telecommunication s [Reorganization] Act 1996; (iii) The Electronic Transaction Ordinance 2002; (iv) The Investigation of Fair Trial Act 2013; and (v) The Federal Investigation Agency [FIA] Act 1974.	8b. All laws in Pakistan authorizing surveillance, interception and filtering of communications / content should be amended to ensure they are not in contravention of fundamental rights enshrined in the constitution.	8b. Parliament, political parties, federal government, PTA, ISPAK, Ministry of Information and Technology, representative associations of media owners and workers, civil society, digital rights groups and media support groups

Key Problems/findings	Recommendations	Stakeholders
8c. **Autonomy:** PTA is not sufficiently independent and lacks adequate protection against interference in the exercise of its powers by official actors who retain executive discretion to intervene in the operation of telecom service providers.	8c. The PTA Act should be amended to provide strong protections against executive interference in the work of PTA, leaving all regulatory functions in the hands of the regulator alone.	8c. PTA, ISPAK, telecom companies, Ministry of Information Technology, civil society, digital rights groups and media support groups
8d. **Misuse of technology:** Modern filtering and surveillance technologies can be dual purpose and help the authorities, and especially government and security authorities, to unlawfully spy on citizens and filter content in violation of fundamental rights.	8d. The sale of dual purpose technologies that can be maliciously used for surveillance and filtering by end users should be regulated against unlawful use.	8d. Federal government, PTA, ISPAK, Ministry of Information and Technology, civil society, digital rights groups and media support groups

Key Problems/findings	Recommendations	Stakeholders
8e. **Digital rights:** Existing and proposed new laws, including the Prevention of Electronic Crimes [PEC] Act 2016, relating to curbing cybercrimes contravene free speech and privacy rights, and vest too much power in the executive to criminalise online speech.	8e. All such laws, including the proposed PEC Act, should be restricted in scope to electronic/cybercrimes and security of information infrastructure and should not adversely impact RTI. Their application should be subject to judicial oversight instead of executive fiat. Laws should be enacted to provide for the establishment of privacy commissions to protect privacy rights and data protection.	8e. Federal government, PTA, ISPAK, FIA, Ministry of Information and Technology, civil society, digital rights groups and media support groups
8f. **Online censorship:** The authorities retain the power to impose complete bans on websites, including social media platforms such as Facebook and YouTube.	8f. All laws, including PTA Act, should disallow any blocking of websites except in accordance with a court order issued pursuant to a legitimate law in line with international standards.	8f. Federal government, PTA, ISPAK, Ministry of Information and Technology, civil society, digital rights groups and media support groups
8g. **Fair competition:** There is no level playing field or competitive telecom and cyberspace regulatory framework. The system gives one actor, the Pakistan Telecom Co Ltd (PTCL), power over its competitors, through its control of the Pakistan Internet Exchange (PIE).	8g. The role of PIE as a central clearinghouse for all telecom traffic should be abolished. Control over central clearinghouse functions should be vested in an independent PTA rather than PTCL.	8g. Federal government, PTA, ISPAK, PTCL, Ministry of Information and Technology, civil society, digital rights groups and media support groups

Key Problems/findings	Recommendations	Stakeholders
CHAPTER 9. ACCESS TO INFORMATION ***Right to information legal framework, secrecy, whistleblower protection***		
9a. **Federal-level RTI:** At the federal level, there is an FOI [freedom of information] law rather than RTI [right to information] law, which fails to measure up to international standards.	9a. The law at the federal level should be replaced with a proper RTI law in line with Article 19A of the Constitution and international standards.	9a. Federal government, civil society, representative associations of media owners and workers and media support groups
9b. **Provincial-level RTI:** While Khyber Pakhtunkhwa and Punjab provinces have proper RTI laws in place, Balochistan and Sindh provinces have weak FOI laws, which fail to measure up to international standards.	9b. The FOI laws in Balochistan and Sindh provinces should be replaced with proper RTI laws in line with Article 19A of the Constitution and international standards.	9b. Provincial governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups
9c. **Other regional level-RTI:** No RTI law have been put in place for Federally Administered Tribal Areas and Provincially Administered Tribal Areas (FATA/PATA), Azad Kashmir (AJK) and Gilgit-Baltistan.	9c. Proper RTI laws should be enacted in line with Article 19A of the Constitution and international standards.	9c. Federal, provincial and regional governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups

Key Problems/findings	Recommendations	Stakeholders
9d. Secrecy laws are an impediment to the effectiveness of RTI laws and the sharing of information in all provinces and regions in Pakistan.	9d. Secrecy laws should be reviewed and amended to bring them into line with the standards in the new transparency laws and international standards in this area.	9d. Federal, provincial and regional governments, civil society, representative associations of media owners and workers, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups
9e. The extent of digitisation of records by public bodies is low and there is limited proactive disclosure of information by them, especially online. There are no legal provisions for regions other than Khyber Pakhtunkhwa and Punjab provinces in the whole of Pakistan for proactive disclosure of information.	9e. Public bodies in all territories of Pakistan should allocate more resources to the digitisation of records while central authorities should adopt clear policies in this area and also provide support to public bodies to achieve this task. Territories in Pakistan other than Khyber Pakhtunkhwa and Punjab should incorporate provisions on proactive disclosure into their RTI laws.	9e. Federal, provincial and regional governments, civil society, information commissioners of Khyber Pakhtunkhwa and Punjab, and media support groups

Annexure – II:
Laws, Rules, Regulations and Judicial Decisions

Print Media

Acts & Ordinances

- Associated Press of Pakistan Ordinance, 2002
- The Press Council of Pakistan Ordinance, 2002 (XCVII of 2002)
- The Press, Newspaper, News Agencies and Books Registration Ordinance, 2002
- Registration of Printing Presses and Publications Ordinance, 1997 (XLVIII)
- The National Press Trust (Appointment of Chairman) Ordinance, 1972 (XXIX)
- Newsprint Control Ordinance, 1971, (XI)
- Working Journalists (Conditions of Service) Ordinance, 1960 (XVI)
- Newspaper Employees (Conditions of Services) Act, 1973 (Act LVIII of 1973)
- Working Journalists (Conditions of Services) Ordinance, 1960 (Ordinance XVI of 1960)
- West Pakistan Press and Publications Ordinance, 1963 (XXX)
- The Associated Press of Pakistan (Taking Over) Ordinance, 1961 (XX)
- Press (Emergency Powers) (Amendment) Act, 1950
- Press and Registration of Books (Amendment) Act, 1952 (XXX of 1952)
- Press (Emergency Powers) Act, 1931
- Press and Registration of Books Act, 1867.

Rules & Regulations

- Working Journalists (Wage Board) Rules, 1960
- Press/Newspapers, News Agencies and Books Registration Rules, 2009
- Press Code of Ethics 1997

- West Pakistan Press and Publications (References to Session Judges) Rules, 1960
- West Pakistan Press and Publications (Scrutiny) Rules, 1960.

Electronic Media

Acts/Ordinances

- Pakistan Electronic Media Regulatory Authority Ordinance, 2002
- Electronic Media Regulatory Authority Ordinance, 1997
- Regulatory Authority for Media Broadcast Organizations, 2000

Rules

- Pakistan Electronic Media Regulatory Authority Rules 2009
- Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules, 2010
- Electronic Media (Programs and Advertisements) Code of Conduct, 2015
- The Television Receiving Apparatus (Possession and Licensing) Rules, 1970.
- Pakistan Television Corporation Limited Employees Service Rule 1978
- Pakistan Television Corporation Employees Service Rules 1977

Regulations

- Pakistan Electronic Media Regulatory Authority (Content) Regulations 2012
- PEMRA (Television Broadcast Station Operations) Regulations, 2012
- Pakistan Electronic Media Regulatory Authority (Television Broadcast Operations) Regulations, 2012
- Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations 2012
- Pakistan Electronic Media Regulatory Authority (Distribution Service Operations) Regulations 2011
- PEMRA (Appeal and Review) Regulations 2008 (Repealed)

- Pakistan Electronic Media Regulatory Authority (Media Ownership and Control) Regulations, 2002
- Pakistan Electronic Media Regulatory Authority (TV/Radio Broadcast Operations) Regulations, 2002
- Pakistan Electronic Media Regulatory Authority Cable Television (Operations) Regulations, 2002
- Pakistan Electronic Media Regulatory Authority (Council of Complaints, Organization and Functions) Regulations, 2002
- Standards for the Cable Television Regulations 2003.

Standards

- Terms & Conditions of the License to Establish & Operate FM Radio Broadcast Station
- Terms & Conditions of the License to Establish & Operate FM Radio Broadcast Station (Specialized Subject Station)
- Multi-channel multi-point distribution service (MMDS) Technical Standards
- Terms & Conditions of the License to Establish & Operate International Scale Satellite Television Broadcast Station
- Television Receiving Apparatus (Possession and Licensing) Rules 1970.

Telecommunication and Cyber Laws

Acts & Ordinances

- Pakistan Telecommunication (Re-Organization) Act, 1996 (with 2006 amendments) (Act XII of 1996)
- AJK Adaptation of Pakistan Telecom Re-Organization Act 2005
- Gilgit Baltistan Adaptation Order 2006
- Telecommunication Ordinance, 1994 (Ordinance LI of 1994)
- Pakistan Telecommunication Corporation Act, 1991 (Act XVIII of 1991)
- Pakistan Telecommunication Corporation Ordinance, 1991 (Ordinance XXVII of 1991)
- Pakistan Telecommunication Corporation Service Regulations 1994
- Wireless Telegraphy (Amendment) Ordinance, 1970, (Ordinance X of 1970)

- Post and Telegraph (Amendment) Act, 1962 (Act V of 1962)
- Telegraph (Amendment) Act, 1950 (Act LXXVII of 1950)
- The Wireless Telegraphy Act, 1993 (Act of XVII of 1993)
- Telegraph Act, 1885 (Act of XII of 1885)
- The Electronic Transaction Ordinance, 2002.
- The Cyber Crimes Bill, 2009
- The Prevention of Electronic Crimes Ordinance, 2009
- The Prevention of Electronic Crimes Act, 2016

Rules

- Pakistan Telecom Rules, 2000
- Access Promotion Contribution Rules, 2004 USF Rules, 2006
- Pakistan Telecommunication Rules 2000
- PTA Chairman and Member (Appointment and Qualifications) Rules 2013
- Pakistan Telecommunication Company Limited Service Regulations 1996
- National Radio and Telecommunication Corporation Employees Service Rules 2005
- Pakistan Telecommunication Authority (Functions and Powers) Regulations 2004

Regulations

- Broadband Quality of Service Regulations, 2014
- Telecom Consumer Protection Regulations 2009
- Telecom Consumers Protection (Amendment) Regulations, 2012
- Subscriber Antecedents Verification (2nd Amendment) Regulations, 2012
- Cellular Mobile Network Quality of Service (Amendment) Regulations, 2012
- Pakistan Telecommunication Authority (Functions & Powers) (Amendment) Regulations, 2012
- Telecommunication and Terminal Equipment Installer Regulations, 2012

- Subscribers Antecedents Verification (Amendment) Regulations, 2012
- Mobile Virtual Network Operation (MVNO) Regulations, 2012
- Telecom Consumer Protection (Amendment) Regulations, 2011
- Numbering Allocation and Administration Regulations, 2011
- Cellular Mobile Quality of Service Regulations, 2011
- Access Promotion Regulations, 2005
- Access Promotion Regulations, 2005 Amendments
- Subscribers Antecedents Verification Regulations, 2010
- GPRS/EDGE Service Quality of Service Standards Regulations, 2010 (Telecommunication System Clock)
- Telecom Consumers Protection (Amendment) Regulations, 2010 Amendment in Class Licensing and Registration Regulations
- Monitoring and Reconciliation of Telephony Traffic Regulations, 2010
- Interconnection Dispute Resolution (Amendment) Regulations, 2010
- Protection from SPAM, Unsolicited fraudulent and obnoxious communication Regulations 2009
- Telecom Consumer Protection Regulations 2009
- Protection from Health Related Effects of Radio Base Station Antenna Regulations 2008
- Monitoring and Reconciliation of International Telephony Traffic Regulations 2008
- Amendments - PTA (Functions & Powers), Regulations 2006
- Amendments - Class Licensing and Registration Regulations 2007
- Wireless Receiving Apparatus (Licensing) Rules, 1957 (Posts and Telegraphs).

General Laws

- The Punjab Transparency and Right to Information Act, 2013
- The Khyber Pakhtunkhwa Right to Information Act, 2013
- Contempt of Court Ordinance, 2003
- Freedom of Information Ordinance, 2002

- The Freedom of Information Rules, 2004
- The Balochistan Freedom of Information Act, 2005
- The Balochistan Freedom of Information Rules, 2007
- The Sindh Freedom of Information Act, 2006
- Defamation Ordinance, 2002
- Defamation (Amendment) Act, 2004
- Copyright (Amendment) Ordinance, 2000
- Pakistan Intellectual Property Rights Organization Ordinance, 2005
- Federal Supervision of Curricula, Text-Books and Maintenance of Standards of Education Act, 1976 (Act X of 1976)
- Foreign Cultural Associations (Regulation of Functioning) Act, 1975 (Act LXXIX of
- Prevention of Anti-National Activities Act, 1974 (Act VII of 1974)
- Contempt of Court Act, 1973
- The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (V)
- The Competition Commission Act, 2010
- Customs Act, 1969
- West Pakistan Maintenance of Public Order (Amendment) Ordinance, 1963 (IX)
- Indecent Advertisements Prohibition Act, 1963
- West Pakistan Maintenance of Public Order Ordinance, 1960 (XXXI)
- Pakistan Penal Code 1960 (Sections 295 – 298 and Sedition Laws 121a, 123a)
- West Pakistan Entertainments Duty Act, 1958 (Act X of 1958)
- Security of Pakistan Act, 1952
- Press Emergency Powers (Amendment) Act, 1950 (Act LXXII of 1950)
- Foreign Relations Act, 1939
- Official Secrets Act, 1923 (XIX)
- Post Office Act, 1898.

Relevant Provisions of Other Laws

Constitution of Pakistan

Article 19 & 19(A) – Freedom of Expression

Article 159 – Broadcasting and telecasting

Article 204 – Contempt of Court

Article 233 – Power to suspend Fundamental Rights, etc. during emergency period.

Pakistan Penal Code

Section	Offense
124-A	Sedition
153-A	Promoting enmity between different groups, etc.
153-B	Inducing students, etc. to take part in political activity
292	Sale, etc. of obscene books
293	Sale, etc. of obscene objects to young person
295, 295-A to C	Offences relating to religion and willful desecration of places of worships, Holy Books of different religions, damage or defilement of the copy of the Holy Qur'an or extract thereof, or its derogatory use or unlawful purpose, derogatory remarks against the Holy Prophet of Islam.
298	Uttering words with deliberate intent to wound religious feelings;
298-A	Derogatory remarks in respect of holy personages
298-B	Misuse of epithets, descriptions and titles reserved for certain holy personages or palces

298-C	Qauidiani calling himself a Muslim
463 to 489-E	Offences relating to documents and to trade or property marks
499 to 502	Defamation
505	Statements conducting to public mischief.

Code of Criminal Procedure

Section	**Offense**
99-A	Power to declare certain publications forfeited and to issue search-warrants for the same
99-B	Opportunity for application to High Court to set aside order of forfeiture.

Jurisprudence: case law

Below is a brief outline of just a few important cases in our jurisdiction relating to and affecting media.

Political Fairness & Neutrality

PLD 1997 Lahore 852	Court held that news corporations are to allocate equal airtime and space and usage to all political parties.
	Tamseel Javed vs. Federation of Pakistan, 1984
	Federal Shariat Court held that it is an Islamic duty of journalists to verify factual veracity of their statements.
NLR 1991 Civil 46	News corporations were held to be public functionaries expected to act, in a fiduciary relation with public, with fair, impartial and

	equitable treatment under Article 4 of the Constitution.
Defamation	
1984 CLC 325	Prohibiting journalists against defamation and criminal prosecution causing loss to good reputation for honesty, integrity and efficiency
PLD 1990 Lahore 171	Ibid
1995 CLC 1246	Court held news reporter to be guilty of defamating the plaintiff for using "hard, oppressive, detrimental [language which] could cause damage to the reputation and integrity of the plaintiff."
Printing	
PLD 1963 Provincial Statutes 300	On press and publication.
PLD 1963 Provincial Statutes 351	Administrative regulations and requirements of registration and set up of press organizations.
PLD 1988 Central Statutes 113	Ibid.
PLD 1989 Central Statutes 120	Ibid.
PLD 1960 Central Statutes 189	Regulation of working conditions and terms of services of journalists.
PLD 1956 Central Statutes 228	Regulation of necessary commodities.
Broadcasting	
PLD 1973 Central Statutes 288	Enlisting detailed guidelines for the broadcasting corporations.
PLD 1979 Central Statutes 290	On Section 22 of Pakistan Broadcasting Corporation (PBC) Ordinance, 1979.
PLD 1993 Central Statutes 435	Officers transfers to PBC ceased to be civil servants and became employees of the corporation.

Miscellaneous Media Laws

PLD 1979 Central Statutes 56	Offence of qazf relating to propagation through media of the offence
PLD 1981 Central Statutes 278	Closure of cinemas, theatres and similar establishments during month of Ramazan
PLD 1974 Central Statutes 151	Prevention of anti-national activities
PLD 1977 Central Statutes 18	Content of contempt of court offence
PLD 1975 SC 383	Ibid
PLD 1990 Central Statutes 20	Propagation of law reports and materials
PLD 1951 Central Statutes 48	Press emergency powers scope
PLD 1976 Central Statutes 247	Extent of Federal oversight of educational material
PLD 1970 Central Statutes 184	Measures against monopolies and trade restrictive practices
PLD 1976 Central Statutes 43	Prohibition of political propaganda by foreign associations
PLD 1975 Central Statutes 9	Barring establishment or operation of political parties with anti-national motives.

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"This resource has been produced by Institute for Research, Advocacy and Development (IRADA) with assistance of International Media Support (www.mediasupport.org) under a media development program for Pakistan supported by DANIDA. The contents of this resource reflect the views and findings of the producers/authors alone, not necessarily those of IMS or DANIDA."

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